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Supreme Court of the United States

October Term, 1996

YOUNIS BROS. & CO., INC.,

Petitioner,

vs.

CIGNA WORLDWIDE INSURANCE COMPANY,

Respondent,

-and-

THE ABI JAOUDI AND AZAR TRADING CORPORATION,

Petitioner,

vs.

CIGNA WORLDWIDE INSURANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

These actions, in part, dealt with whether losses suffered in Liberia in 1990 were excluded by the "war risk exclusions" of Respondent's insurance policies. Those exclusions required the Respondent, CIGNA Worldwide Insurance Company [hereinafter CIGNA], to prove that there was an identifiable group that had the "intent to overthrow the established government and assume control itself." CIGNA's only evidence on those issues was hearsay testimony, which was rejected by the jury, but accepted by the lower court which granted judgment n.o.v.

The Questions presented are:

1. Was the testimony of CIGNA's witnesses admissible under the provisions of Federal Rules of Evidence?

2. If so, was the weight to be afforded to such testimony to be decided by the jury or the trial judge?

The lower court by using a broad formulation of proximate cause found the exclusions applicable. It interpreted the Liberian Supreme Court's opinion in *Mano Insurance Company v. Picasso Cafeteria and Spanish Gallery* (Appendix F) as adopting such a formation. That case was reconsidered by the Liberia Supreme Court, which held, as does Pennsylvania law, that the exclusion was to be narrowly construed (Appendix G).

The Question presented is:

3. Because of the historic relationship between the countries of Liberia and the United States should the decision of the Supreme Court of Liberian in *Mano* on causation be given

effect under the concept of judicial comity, especially since the standard used below was erroneous?

Petitioners had asserted that CIGNA had, within the meaning of 42 Pa. C.S.A. § 8371, acted in "bad faith;" and, requested that the jury determine both liability and damages pursuant to that statute. The District Court held that the amount of interest and counsel fees was an issue for it. The bad faith claim was bifurcated, and the jury determined that, as to the Petitioner, Younis Bros. & Co., Inc., CIGNA had acted in "bad faith." The court then imposed a requirement that Petitioner also prove outrageousness before it could be awarded punitive damages.

Thereafter, by its Order of March 10, 1996, the court refused to award interest and counsel fees based on its interpreted of the statute as vesting it with the right to make an "independent review of the evidence." Based on that review the court held that the bad faith "does not rise to the level that moves this court to exercise its discretion."

The Questions presented are:

4. Was the refusal to allow the jury to decide the issue as to the amount of interest and counsel fees a denial of the Seventh Amendment right to a jury trial as to those issues; and, did the court improperly require the jury to reconsider its finding of bad faith by adding the element of outrageousness?

5. Did the court, by reviewing the evidence, fail to give effect to the findings of the jury, as mandated by this Court.

6. Was the lower court's interpretation of its discretionary power erroneous, since such an interpretation would result in the statute being unconstitutional because it grant unfettered discretion?

LIST OF ALL PARTIES

The *Petitioners* are:

Younis Bros. & Co., Inc.; and,

The Abi Jaoudi and Azar Trading Corporation

The *Respondent* is:

CIGNA Worldwide Insurance Company

The other named parties were added defendants in The Abi Jaoudi and Azar Trading Corporation case. They objected because of lack of diversity and were dismissed. That ruling was not appealed.

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Petitioners, Younis Bros. & Co., Inc. and The Abi Jaoudi and Azar Trading Corporation, respectfully request that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit, entered on July 30, 1996, which affirmed the judgments of the United States District Court for the Eastern District of Pennsylvania entered on September 18, 1995, March 13, 1995 and November 16, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, entered on July 30, 1996 is reported at 91 F.3d 13 (3rd. Cir. 1996). It is reprinted in Appendix A hereto.

The opinion of the United States District Court for the Eastern District of Pennsylvania (O'Neill, J.), entered on September 18, 1995 is reported at 899 F.Supp. 1385 (E.D. Pa. 1995). It is reprinted in Appendix B hereto.

The opinion of the United States District Court for the Eastern District of Pennsylvania (O'Neill, J.), entered on March 10, 1995 is reported at 1995 WL 118211 (E.D. Pa. March 10, 1995). It is reprinted in Appendix C hereto.

The opinion of the United States District Court for the Eastern District of Pennsylvania (O'Neill, J.), entered on November 16, 1994 is reported at 882 F.Supp. 1468 (E.D. Pa. 1994). It is reprinted in Appendix D hereto.

The opinion of the United States District Court for the Eastern District of Pennsylvania (O'Neill, J.), entered on October 15, 1993. It is reprinted in Appendix E hereto.

The decision of the Supreme Court of Liberia, *Mano Insurance Company v. Picasso Cafeteria and Spanish Gallery,*

March Term, A.D. 1995 (Dated July 28, 1995) is not reported. It is reprinted in Appendix F hereto.

The decision of the Supreme Court of Liberia, *Mano Insurance Company v. Picasso Cafeteria and Spanish Gallery,* March Term, A.D. 1995 (Dated September 27, 1996) is not reported. It is reprinted in Appendix G hereto.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332 (diversity jurisdiction) and pursuant to the FCN Treaty between the United States and Liberia (federal right).

The United States Court of Appeals for the Third Circuit had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1291 since the Order of September 18, 1995 was a final decision of the District Court.

This jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

42 Pa. C. S. § 8371. **Actions on insurance policies.**

> In an action under an insurance policy, if the *court* finds that the insurer has acted in bad faith toward the insured, the *court* may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by

the insured in an amount equal to the prime rate of interest plus 3%.

(2) Award punitive damages against the insurer.

(3) Award court costs and attorney fees against the insurer.

STATEMENT OF THE CASE

Petitioners commenced these actions to recover insurance benefits due under policies of insurance issued to them by CIGNA Worldwide Insurance Company (hereinafter referred to as CIGNA); and for damages for CIGNA's bad faith handling of the claims.

A. Facts

Petitioners are two Liberian corporations.

Younis Bros. & Co., Inc. (hereinafter referred to as Younis Bros.) was in the business of importing and selling building materials. It also manufactured floor tiles, aluminum windows and doors. The Abi Jaoudi and Azar Trading Corporation (hereinafter referred to as AJA) imported and sold food products, tobaccos and liquors. It operated two (2) retail supermarkets and a wholesale warehouse.

The actions concerned Petitioners' right to indemnity under various policies issued by CIGNA, which were in full force and effect at the times of the losses, the summer and fall of 1990.

Petitioners contented that their losses were covered by the

policies. CIGNA contented that Petitioners had not been complied with numerous policy provisions. CIGNA also asserted that even if all policy provisions had been complied with, that there could be no recovery because the losses were caused by actions covered by the "war risk exclusions.[1]"

A principal issue in the litigation was which of the policies endorsements were applicable to the losses: riot or civil commotion, which were specifically insured; or, the war risk provisions, which excluded coverage.

In support of their assertions Petitioners called fifty (50) witnesses, thirty (30) of whom who testified to the specific losses. The eyewitnesses presented testimony as to the actual causes of the losses; and, there was corroborative evidence from members of the Liberian National Police, Criminal Investigation Division and the Chief Fire inspector of the Republic of Liberia.

CIGNA presented twenty-nine (29) witnesses of which fifteen (15) testified to the specific losses.

CIGNA sought to equate chaos with its policies' war risk exclusion. Petitioners never disputed that there was significant turmoil in the country (see the stipulated to "Facts" contained in the Final Pre-Trial Memorandum (J/A at 160); and CIGNA's evidence only detailed those facts (J/A at 162-163).

To prevail on the "war risk exclusions" CIGNA had to establish an insurrection since ". . . insurrection is the lowest common denominator for all these forms of internal rebellious

1. This is a short hand reference to the various exclusions contained within the policies, premised on the losses being caused by an insurrection, rebellion, revolution, civil war or action taken by governmental authority in hindering, combating, or defending against such an occurrence.

activity" (CIGNA's Proposed Points for Charge, J/A at 1799-1800).

The *only* evidence CIGNA offered in support of its assertion that Charles Taylor, or Prince Johnson or their followers had the necessary intent to overthrow the established government and assume its control was hearsay testimony (J/A at 81).

The trial record shows that the testimony of most of CIGNA's witnesses was based on what they heard on the radio. The admissibility of the testimony of what CIGNA's witnesses heard on the radio was initially raised at the Pretrial Conference on January 31, 1994. CIGNA conceded that "they are technically, you know, they are hearsay out-of-court type statements (J/A at 137)." While Petitioners objected to their use, the trial judge allowed it "[b]ecause I don't think it's hearsay or if it is, it's an exception to the hearsay rule (J/A at 139-140).

Only three persons claimed to have direct knowledge.

One witness, Alistair Sinclair, testified that he had been at a press conference at which Charles Taylor had said that the intentions of the movement of the NPFL was to overthrow the government of Samuel Doe (J/A at 1001).

Two (2) persons, E. Othello Gongar and Mark C. Huband, testified that Charles Taylor and his followers allegedly intended to both overthrow the government and assume control of it. And, Mr. Huband was the only person to testify to the alleged intention of Prince Johnson and his followers to both overthrow the government and assume control of it.

Mr. Gongar testimony was that President Doe, in a cabinet

meeting stated that Taylor had "come to overthrow his government and establish a new government (J/A at 1220)."

During cross examination Mr. Gongar testified that President Doe indicated that he was planning to hold elections, and would agree not to run for reelection as a way of ending the civil crisis (J/A at 1242.1-1242.3)

Mark C. Huband testified that Charles Taylor wanted to "rid the country of the government of Samuel Doe and to replace it with himself as head of state (J/A at 312 and 316-317)." He also testified that Prince Johnson "was obsessed by overthrowing Doe and replacing him (J/A at 388);" but, admitted that Johnson only talked about himself as head of the army (J/A at 389).

On cross examination Mr. Huband testified that the meeting with Charles Taylor was both tape recorded (which went to the BBC) and recorded on video film (which was with his parents in England) (J/A at 424.1). He also testified that the meeting with Prince Charles was also on video film, which he assumed was with his parents in London (J/A at 424.2-424.3).

Those tapes were subsequently produced (J/A at 1007.1-1007.2 and 1024.1). None contained any part of any interview with Charles Taylor. The tape of Prince Johnson showed him, when asked about who should lead the country, answering "a civilian man" should be the new President (J/A at 1009).

B. Proceedings Below

On October 30, 1991 the Petitioners filed their Civil Actions against CIGNA. CIGNA, in its response to the Complaint of AJA averred that other insurers had provided portions of AJA's coverage. Those companies, as set forth in

the caption, were added as party Defendants. The added Defendants objected because of a lack of diversity (they were foreign corporations); and, were dismissed from the AJA action.

The actions proceeded against CIGNA, only. The cases were called for trial on February 7, 1994.

Pursuant to CIGNA's requests: the cases were consolidated for trial; the bad faith claims were bifurcated; and, the jury was to make special findings under F. R. Civ. P. Rule 49(a).

Near the close of the evidence, because of the number of issues the jury had to resolve, the trial judge decided to trifurcate the charge and the deliberations.

In the first phase of the deliberations the jury found that Petitioners established coverage under the policies; and that the causes of action were not barred by the "war risk exclusion" (First Jury Questionnaires, J/A at 1562-1569).

In the second phase of its deliberations, the jury had to determine whether Petitioners had complied with various policy provision that CIGNA asserted were conditions precedent to its obligation to indemnify. As to Younis Bros. the jury found that it had complied with all such conditions (Second Jury Questionnaire, J/A at 1570-1573). As to AJA the jury was hung on two (2) of the twenty-nine (29) questions; but, found AJA had, as to the balance, complied with all conditions (AJA's Second Jury Questionnaire, J/A at 1574-1581). Because the jury was unable to resolve two issues the trial court ended the AJA case.

The second portion of the trial, commenced as to Younis Bros., only, was to determine whether CIGNA had acted in bad faith towards its insured; and, the amount of damages.

The court had previously ruled that while the jury would decide whether CIGNA had acted in bad faith, that the court would decide whether interest, counsel fees and costs would be awarded (J/A at 1459). Immediately prior to the start of the bad faith portion of the case the court bifurcated that portion of the case, requiring Younis Bros. to establish that CIGNA had acted in bad faith before it could litigate the sum it was entitled to receive under 42 P.S. § 8371 (J/A at 1328.1).

The jury found that CIGNA had acted in bad faith towards Younis Bros. (Third Jury Questionnaire, J/A at 1582). After that finding was made the trial court, pursuant to CIGNA's request, ruled that the jury must also find that CIGNA's actions were outrageous. The jury found that they were not outrageous and no punitive damages were awarded.

The trial concluded on April 7, 1994.

Subsequently Younis Bros moved for judgment in its favor for the amount of its stipulated losses ($796,176.09) together with interest allowable under Pennsylvania law. AJA moved for partial judgment in its favor for the amount of its stipulated losses[2] together with interest allowable under Pennsylvania law.

The court first ruled on CIGNA's assertion that the Act was unconstitutional. In his Memorandum of November 16, 1994 (App., Exhibit 4) Judge O'Neill ruled that it was constitutional.

The Court then considered the request of Younis Bros for interest, counsel fees and costs under 42 P.S. § 8371. In his

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2. While there was a dispute as to the value of the stock, accounts receivable and money lost by AJA (and at one location a claim of fraud and lack of cooperation) CIGNA had stipulated to the amount of the AJA's other damages, which totaled $1,763,868.

Memorandum of March 10, 1995 (Appendix C) Judge O'Neill ruled that the he would not award interest, counsel fees and costs.

On August 8, 1995 (CIGNA, by facsimile, advised Judge O'Neill of the Liberian Supreme Court's ruling in *Mano Insurance Company v. Picasso Cafeteria and Spanish Gallery,* (Appendix F) (a copy of that letter is attached hereto as Appendix H). Later that afternoon the court, by facsimile, proposed holding final argument on August 14, 1995 (a copy of that letter is attached hereto as Appendix I). At the request of Petitioners' counsel argument was held on August 21, 1995. The court issued its Memorandum on September 15, 1995 (Appendix B) granting CIGNA judgment n.o.v. as to all claims (the Memorandum and Order were formally entered on September 18, 1995).

Petitioners filed their appeal on October 13, 1995 (J/A at 1). By letter dated June 7, 1996 Petitioners, in accordance with F.R.A.P., Rule 28(j), forwarded P. Douglas Sisk, Clerk, United States Court of Appeals for the Third Circuit, an affidavit stating that reargument will be heard in the *Mano* case (Appendix J).

On July 30, 1996 the United States Court of Appeals for the Third Circuit issued its opinion and judgment (Appendix A).

Younis Bros. & Co., Inc. and The Abi Jaoudi and Azar Trading Corporation timely filed this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

By affirming the lower court's granting of judgment n.o.v., the Court of Appeals for the Third Circuit: held the Federal

Rules of Evidence allow testimony of radio interviews, which fall under none of the accept exceptions to the hearsay rule; create a special exception for statements made by non-parties to members of the news organizations; affirmed a decision heavily influence by the decision of the Liberian Supreme Court, despite being advised that that case was being reconsidered; and, failed to address the constitutional issues associated with the lower court's rulings on the claim for damages under 42 Pa.C.S. § 8371.

I. The Federal Rules of Evidence do not authorize the introduction of the testimony offered by CIGNA to support its assertion of the applicability of a policy exclusion.

At the trial CIGNA, over Petitioners' objections, introduced the recollection of individuals as to their characterization of the intent of non-parties. The only statement ever made by either the lower court or the Court of Appeals as to the basis for the admissibility of this testimony was the trial judge's at the Pretrial Conference on January 31, 1994: "I don't think it's hearsay or if it is, it's an exception to the hearsay rule (J/A at 139-140)." And this position was taken despite CIGNA's concession that the statements "are technically, you know, they are hearsay out-of-court type statements (J/A at 137)."

In the Brief of Appellee filed with the Court of Appeals, CIGNA's sole argument that the testimony was properly admitted into evidence was its assertion that "such evidence proved intent, motive and plan, and was specifically admissible under Fed. R. Evid. 803 (3)" Brief of Appellee, page 31, footnote 14.

However, the statements were not offered as evidence of Taylor's and/or Johnson's "then existing mental, emotional, or

physical condition." Rather they were offered as proof of the matter asserted.

> [T]he state of mind exception to the hearsay rule ... allows the admission of an extrajudicial statement, not to prove the truth of the matter asserted, but to show a future intent of the declarant to perform an act if the occurrence of that act is in issue. *United States v. Freeman,* 514 F.2d 1184, 1190 (10th Cir. 1975).

Further, statements made at a press conference/interview weigh heavily against their reliability.

> Rule 803(3) is related to the exceptions created by Rules 803(1) and (2), which allow statements of present sense impressions and excited utterances .... The theory behind all three exceptions is that "[t]he greater the circumstances for misrepresentation, the less reliable is the declaration" [citations omitted]. *United States v. Faust,* 850 F.2d 575, 585-86 (9th Cir. 1988). See also: *United States v. Cardascia,* 951 F.2d 474, 487-88 (2nd Cir. 1991).

In addition, as to Gongar's testimony:

> [Rule 803(3)] does not authorize receipt of a statement by one person as proof of another's state of mind. *Hong v. Children's Memorial Hospital,* 993 F.2d 1257, 1265 (7th Cir, 1993), cert. denied 114 S.Ct. 1372, 128 L.Ed.2d 48 (1994).

Even assuming, *arguendo*, that statements of non-parties made at press conference and on radio interviews was to be introduced, Petitioners had argued that CIGNA should have been required to either offer in recordings and/or verbatim transcripts of same or prove they did not exist (J/A at 283-287). CIGNA was not required to do either even though such evidence did exist (*i.e.*, the testimony of M. Huband, J/A at 424.1 to 424.3).

II. Even if the Federal Rules of Evidence authorize the introduction of the testimony offered by CIGNA, its weight was for the jury, not the court.

If the testimony was properly admitted, in a trial that lasted two (2) months, in which seventy-six (76) persons testified CIGNA's total evidence offered on the crucial issue of intent to assume control of the government was the hearsay testimony of Othello Gongar and Mark Huband. That testimony clearly established that Prince Johnson had no such intention.

Hence, the applicability of the war risk exclusion was dependent on accepting either President Doe's statement, as reported by Mr. Gongar, as being literally true, even though Mr. Gongar admitted that: "[President Doe] made a statement. Whether it was his belief or not I cannot tell (J/A at 1242.3)." And/or accepting the testimony of Mr. Huband, despite the fact that he had mischaracterized Prince Johnson's intentions; and, could not produce the tapes he claimed contained Mr. Taylor's statements of his intentions.

The jury, by its findings clearly rejected this testimony. Yet that finding was set aside by the Lower Court without any explanation of how the hearsay evidence[3], which was the basis

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3. "Defendant's witnesses testified that they *heard* both Taylor and Johnson state an intention to overthrow the government of President Doe. (Cont'd)

for its finding that of insurrection, was admissible, let alone had proven, "as a matter of law that [the] turbulence rose to the level of insurrection (App, Exhibit 2)." And this issue was not addressed by the Court of Appeals, which accepted the lower court's position, holding that "[t]he record further reveals that one or both of them [Charles Taylor and Prince Johnson] intended to overthrow the government and seize power."[4]

Uncorroborated hearsay or rumor does not constitute substantial evidence sufficient to support a finding. *Hill v. Fleming*, 169 F. Supp. 240 (D.C. Pa. 1959). It clearly cannot be the basis for granting a judgment n.o.v., as was done in these cases.

III. The District Court and Court of Appeals used the wrong standard of causation.

Assuming, *arguendo*, that an insurrection occurred, that fact would not bar Petitioners' right to indemnity under their policies unless the insurrection was the cause of the losses.

(Cont'd)

Manchester Guardian correspondent, Mark C. Huband testified that he met with Taylor and that Taylor '*stated* very clearly . . . that his aim was to rid the country of the government of Samuel Doe and to replace it with himself as head of state.' Further, a witness presented by plaintiffs — Peter Jallah . . . — testified that he *heard* Taylor speak on the BBC radio about overthrowing the Doe Government [emphasis added]." App., Exhibit 2.

4. The Court of Appeals went on to state: "Numerous witnesses testified as to the objective manifestations of that intent, while there is not a scintilla of evidence to suggest some other goal."

While the record does contain other explanations for the conflict, there was and is no duty on the part of Petitioners to rebut CIGNA's theory. The burden was on CIGNA to prove its exclusion applicable, not on Petitioners to disprove it. Further, the policies have no requirement that Petitioners explain the cause of a "riot" or "civil commotion" much less a "fire" or "burglary." *O'Neill v. Metropolitan Life Ins. Co.*, 26 A.2d 898 (Pa. 1942); *Beato v. DiPilato*, 106 A.2d 641 (Pa. Super. 1954).

The insurance policies contain different standards for causation, *viz.*, whether the loss was "caused directly or indirectly by" (Fire policies (J/A at 1535, 1620 and 1632)); "due to" (Burglary Policy (J/A at 1543) and Money and Security policy (J/A at 1557)); and, "caused by or resulting from" (Accounts Receivable policy (J/A at 1551)).

There was a question whether a conflicts of laws issue was involved. That question arose, in part, because in contract cases Liberia follows the *lex loci contractus* rule; and, the Fire Policies, Burglary Policy and Money and Securities Policy were executed by the President and Secretary-Treasurer of Insurance Company of North America "at Philadelphia, Pennsylvania."

Petitioners' position was that there is no conflict between Pennsylvania and Liberian law, pertaining to the interpretation of insurance policies. There was a dispute as to this position, but never to the fact that only Pennsylvania law or Liberian law applied. The lower court, in its opinion of October 15, 1993 (Appendix E) noted: "The parties agree that the legal issue before the Court is a choice of law question and that either the law of Pennsylvania or Liberia applies." Therefore, in deciding the issue, one of those laws had to be applied.

A. Pennsylvania Law

While the lower court acknowledged the difference standards of causation, it held that they all "articulate a unique proximate cause test excusing an insurance company from providing coverage to its insured if the insurrection was the efficient cause or the predominant cause of the loss." (Appendix B). The Court of Appeals accepted this approach, holding: ". . . the total breakdown in civil authority caused the insurrection *compounded by* the looting and other damage"

(Appendix A). However, neither court cited any Pennsylvania case as support for their holdings.

Under Pennsylvania law "[e]xceptions to the general liability of the insurer are to be strictly construed against the insurance company." *Frisch v. State Farm Fire & Cas. Co.*, 275 A.2d 849, 851 (Pa. Super. 1971). *See also, Miller v. Prudential Ins.*, 362 A.2d 1017 (Pa. Super. 1976); *Allegheny Industries v. Lloyd's London*, 472 F. Supp. 42 (E.D. Pa. 1979); and, *Compagnie Des Bauxites v. Ins. Co. of No. America*, 554 F. Supp. 1075 (E.D. Pa. 1983). Such a construction is obviously inconsistent with broad formation of proximate cause used by the trial court.[5]

Clearly, under Pennsylvania law the exclusions had to be interpreted narrowly, which was not done.

B. The Liberian Supreme Court has now definitively stated the standard of causation to be used in determining whether an insurance loss occurring during the civil crisis can be denied. This Court, under the doctrine of judicial comity, should give effect to that decision.

The Liberian Supreme Court addressed the issue of causation and held that a narrow construction of causation was to be used.

The original *Mano* decision (Appendix F) was clearly the catalyst for the lower court's decision. The jury made its last finding of fact on April 7, 1994. Sixteen (16) months later CIGNA advised the court of the *Mano* decision (Appendix H);

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5. "[T]he Liberia Supreme Court *also* adopted a broad formulation of proximate cause . . . for all property losses that 'arose from the general effect of the civil war.' [emphasis added]" (Appendix B).

and, in response to that notice, that same afternoon the Lower Court scheduled final argument (Appendix I). Five (5) weeks later the lower court issues its decision.

On June 7, 1996 the Court of Appeals was advised, pursuant to F.R.A.P., Rule 28(j) that the Liberian Supreme Court was to hear reargument on the *Mano* case (Appendix J). It issued its opinion on July 30, 1996, less than two (2) months before the second *Mano* decision was issued. That decision states:

> Assuming however, that the crisis had entered in Monrovia on or before the date in question, that fact alone would not be sufficient to warrant a denial of petitioner's claim.
>
> As a matter of law to warrant a denial of Insurance claim, it is a settled principle at common law that the injury subject of the claim must have been a direct result of the war. An actual military offensive or defensive operations the direct effect of which gave rise to the claim is required and not just from a remote cause [citations omitted]. *Mano Insurance Company v. Picasso Cafeteria and Spanish Gallery* (Appendix G).

That standard is the opposite of the standard used by the trial court (". . . the insurrection that existed in Liberia in 1990 was the effective cause of the losses . . . "; and, the Court of Appeals ("caused the insurrection compounded by the looting and other damage."

C. Judicial Comity

While the lower courts' decisions to adopted a broad formulation of proximate cause was erroneous under either Pennsylvania or Liberia law, it is respectfully submitted that now that the Liberian Supreme Court has, as a matter of law, fixed the standard to be used in insurance cases that courts in this country should apply that standard, since it "has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question." *Mast, Foos & Company v. Stover Manufacturing Company,* 177 U.S. 485, 488, 20 S. Ct. 708, 44 L. Ed. 856, 858 (1900). *See also, Conflict of Laws,* 16 Am. Jur. 2d § 11.

While comity is only applicable if the proposed foreign opinion would be applicable as *res judicata* or collateral estoppel, here the clear pronouncement of the standard of causation should be view as having, at least, the effect of collateral estoppel. To hold otherwise could result in forum-shopping and inequitable administration of the laws, since the parties substantive rights would be determine based on the forum used.

Application of the correct standard for causation would mean that for the losses to be excluded from coverage they had to have been "caused directly . . . by," "due to" and/or "caused by or resulting from" an insurrection. But in these cases there was no evidence to overcome the testimony of Petitioners' eyewitnesses as to the direct cause of the loss. None of the losses were caused by the direct effect of an actual military offensive or defensive operation; and, therefore were not excluded from coverage under the "war risk exclusions."[6]

6. This conclusion is appropriate since the jury found that the losses at two of the locations occurred after October 30, 1990 (J/A at 1578 and 1579). This is more than two (2) months after the ECOMOG peace keeping force (Cont'd)

Further, none of the losses were "caused . . . indirectly by" the civil unrest. CIGNA argued, and the courts below accepted, that since there was unrest in the country, that unrest had to be a "cause" of the losses. But the proper, narrowly defined, standard for an indirect loss would be a contributing concurrent cause that did not directly bring about the result.

Such a definition would be consistent with the insurance industry's understanding of the meaning attributable to those terms. In the *Fire, Casualty & Surety Bulletins* (J/A at 1808-1809) it states that loss to "a ship or train carrying covered property hit by a misfired missile, [would be] an indirect result of warlike action." And, that view is consistent with Pennsylvania law: *Trexler Lumber Co. v. Allemannia Fire Ins. Co. of Pittsburgh*, 136 A. 856 (Pa. 1927); and, *DiFabio v. Centaur Ins. Co.*, 531 A.2d 1141 (Pa. Super. 1987).

For CIGNA to have properly prevailed below it had to trace the chain of causation, a burden of which it had to be aware (*see* the *Fire, Casualty & Surety Bulletins* (J/A at 1806-1807) dealing with language difficulties existing in war risk coverage). CIGNA accepted that burden. It could have written that its policy was void if events defined by the war risk exclusion occurred, thereby eliminating the causation question. Or, it could have, as did the insurer in *Sherman Williams v. Ins. Co. of the State of Pa.*, 863 F. Supp. 542, 545 (N.D. Ohio 1994), shift the burden of proof to the insureds.

But for the lower court's incorrect adoption of a broad formation of proximate cause, a standard accepted by the Court of Appeals, CIGNA failed to establish even an "indirect" causal relationship between the civil unrest and the Petitioners' losses.

(Cont'd)
arrived in Liberia and after it obtained the tentative agreement to stop the fighting and disengage the faction (Stipulation of Facts from the Final Pre-Trial Order (J/A at 163)).

IV. The Seventh Amendment required the District Court to submit the Petitioners' right to damages, and the amount of same, to the jury.

A. The issues of the amount of interest and counsel fees had to be submitted to the jury.

The Seventh Amendment applies to actions enforcing statutory rights, and a jury trial is required "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Curtis v. Loether*, 415 U.S. 189, 194, 94 S. Ct. 1005, 1008, 39 L. Ed. 2d 260, 266 (1974).

A jury determines not only the underlying facts, but also the inferences and conclusions to be drawn from those facts. Even undisputed facts do not always establish the ultimate fact. "When the ultimate fact is to be inferred from evidentiary facts, the choice between permissible inferences is for the trier of facts [citations omitted]." *McMahon v. Prentice-Hall, Inc.*, 486 F. Supp. 1296, 1301 (E.D. Mo. 1980). And, absent "express[ed] or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instruction by the court." *Baltimore & Carolina Lines, Inc. v. Redman*, 295 U.S. 654, 657, 55 S. Ct. 890, 891, 79 L. Ed. 2d 1636, 1638 (1935). *See also, Allen v. Biggs*, 62 F. Supp. 229 (E.D. Pa. 1945); and, *Mutual Life Ins. Co. v. Green*, 37 F. Supp. 949 (W.D. Ky. 1941).

An analysis of the claims made establish that equitable issues were not involved; and, that Petitioners' right to, and the amount of, § 8371 damages were issues for the jury to decide.

While the majority of cases hold that there is no right to a jury trial as to counsel fees, one district court has held that where there is a demand for jury trial on all issues including

counsel fees and costs, the court cannot "take unto itself decision of this question without intervention of jury the over objection of the third-party defendant." *Davis v. Naviera Aznar S.A.*, 37 F.R.D. 223, 225 (D.C. Md. 1965).

"[T]he right to a jury trial on reasonable attorney's fees where they are not awarded as part of a statutory remedy has long been recognized. *See Smith v. Goode*, 29 Ga. 185 (1859)." *Flieger v. Ash*, 624 P.2d 1295 (Ariz. App. 1981).

Likewise, the awarding of interest was an issue which should have been submitted to the jury. The interest sought, was based on a statutory scheme, and governed by the determination of bad faith, a fact issue for the jury.

While the specific question has not been addressed by the this Court, it has noted that the controlling factor is nature of the relief sought: "their claim for a money judgment is a claim wholly legal in nature however the complaint is construed." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477, 82 S. Ct. 894, 8 L. Ed. 2d 44, 51 (1962).

B. The Seventh Amendment prevented the court from requiring the jury to reconsider its finding of liability under 42 Pa. C. S. A. § 8371.

The trial court had bifurcated the punitive damage count into liability and damages (J/A at 1328.1). The liability count was tried to the jury and a verdict in Petitioners' favor entered on April 6, 1994 (J/A at 1461).

Pursuant to the court's ruling, the only remaining issue was the amount of damages to be awarded. However, on April 7, pursuant to a letter faxed to the court that morning (J/A at 1482.1), the court ruled an additional liability issue had to be

decided before the jury could award damages, *viz.*, that CIGNA's conduct was outrageous.

Assuming, *arguendo*, that there had to be proof of CIGNA's outrageousness,[7] that part of the trial was concluded; and, it was improper to require the jury to reconsider its verdict by include that issue in the damage phase of the case.

The Seventh Amendment mandates that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Here the trial court did just that. The jury had found that CIGNA acted in bad faith. By adding the element of outrageousness the lower court was having that fact "reexamined," in violation of the Seventh Amendment.

V. The lower court review of the evidence after the jury determined that CIGNA had acted in "bad faith" was a violation of the Seventh Amendment.

In the instant case, the trial court had incorrectly ruled that only it could determine the issues of interest, counsel fees and costs (*see* part IV, above). At most, that ruling meant that these cases contained both legal and equitable issues. However, if both issues were present, the factual issues common to both was whether CIGNA was guilty of bad faith. That question had to be

---

7. CIGNA's position that 42 Pa. C. S. § 8371 required a finding of outrageousness, was/is without merit. No other case considering the Act required proving outrageous conduct before there could be a recovery. *See Rottmund v. Continental Assur. Co.*, 813 F. Supp. 1104 (E.D. Pa. 1992); and, *Polselli v. Nationwide Ins. Co.*, 23 F.3d 747 (3rd Cir. 1994).

Further, if outrageousness had to be proved, the trial court's erroneous evidentiary ruling, as set forth in Brief of the Appellants filed with the Court of Appeals, prevented Petitioners from establishing that conduct.

submitted to the jury, and, once answered it was a violation of the Seventh Amendment for the court to reexamine it.

Yet that is what the lower court did. The lower court, in its March 10, 1996 opinion (Appendix C), cast its reexamination of the facts as based on the court having the discretion[8] to make an award of damages. The court stated:

> I do not consider *my independent review of the evidence* in making this determination to improperly intrude upon the fact finding function of the jury . . .
>
> As I presently view the totality of defendant's actions . . . I conclude that such bad faith *as defendant may have exhibited* does not rise to the level that moves this Court to exercise its discretion to award either interest or attorney fees and court costs. [Emphasis added].

The emphasized language makes clear that the trial court was reconsidering the evidence. Its statement "as defendant *may have* exhibited" shows that the court is questioning the fact decided by the jury, *viz.*, that CIGNA had acted in bad faith.

The lower court's suggestion that there can be an analytical distinction between a jury's finding and a court's view of the evidence was an unconstitutional reexamination of the facts; and, a disregarding of this Court's holdings in the cases of *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959); *Dairy Queen, Inc. v. Wood,* 369 U.S. 469,

---

8. The Court's interpretation of its discretion would make the Act unconstitutional, *see* section VI, below.

82 S. Ct. 894, 8 L. Ed. 2d 988 (1962); and, *Ross v. Bernhard*, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970), which required that the court give effect to the finding of the jury.

In *Beacon*, this Court pointed out that:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. [citation omitted]. *Beacon, supra*, 359 U.S. at 501, 3 L. Ed. 2d at 992.

In discussing the District Court's holding which "would compel Beacon to split his antitrust case, trying part to a judge and part to a jury," the court, in footnote 10, stated:

> Since the issue of violation of the antitrust laws often turns on the reasonableness of a restraint on trade in the light of all of the facts [citation omitted] it is particularly undesirable to have some of the relevant considerations tried by one fact finder and some by another. 359 U.S. at 508, 3 L. Ed. 2d at 996.

In *Dairy Queen, supra*, this Court reaffirmed the holding of *Scott v. Neely*, 140 U.S. 106, 11 S. Ct. 712, 35 L. Ed. 358 that "the right to trial by jury must be preserved." *Dairy Queen, supra*, 369 U.S. at 471-472, 8 L. Ed. 2d 48.

In *Ross* this Court held:

> The heart of the action is the corporation's claim. If it presents a legal issue, one

> entitling the corporation to a jury trial under the Seventh Amendment, the right to a jury trial is not forfeited merely because the shareholder's right to sue must first be adjudicated as an equitable issue triable to the court. *Ross, supra,* 396 U.S. at 538, 24 L. Ed. 2d at 736.

Even if both legal and equitable issues were present that did not rescind Petitioners' right to have a jury determine the legal issue. The jury having found that the defendant acted in bad faith, the trial court could not reexamine that issue.

VI. The Court's interpretation of the Act was, in effect, that the Act granted it unfettered discretion. However, such a grant of discretion would make the Act unconstitutional.

The lower court's holding that:

> The determination of bad faith . . . does not obligate the judge to do anything. By using the term "may" . . . the Pennsylvania legislature provided that . . . the trial judge may at his or her sound discretion exercise the inherent equitable power of the court and make such awards . . .

is to hold that the court is granted unfettered discretion by the Act.

That discretion was found to exist based on use of the word "may" in the statute. But the court's interpretation is contrary to the expressed holding of the Pennsylvania Supreme Court in *Hotel Casey Co. v. Ross,* 23 A.2d 737 (Pa. 1942) which was

relying on the holding of this Court in *Supervisors, Rock Island Co. v. United States,* 71 U.S. 435, 18 L. Ed. 419.

In *Hotel Casey* the appellant had been denied a refund of a tax erroneously paid. The Board of Finance and Revenue took the position that the legislature delegated to it "complete and final authority at its discretion to determine what, if any, refunds shall be made to taxpayers . . ." 23 A.2d at 739. The court stated that "if this act is to be construed to have the meaning suggested by appellees, we would be compelled to hold it unconstitutional." 23 A.2d at 740. The Pennsylvania Supreme Court held "where a statute directs the doing of a thing for the sake of justice the word 'may' means the same thing as the word 'shall'." This interpretation of the word "may" has been adopted and reaffirmed by the Pennsylvania appellate courts to the present time, *see Com. D.O.T. v. Century III Chevrolet,* 617 A.2d 43 (Pa. Cmwlth. 1992).

In re Fisher, 344 Pa. 96, 23 A.2d 878 (1942) involved a attack on the law establishing minimum wages for women and minors on the basis that the act was an improper delegation of legislative power because of the use of the word "may." The court held:

> As the purpose to be achieved by this statute is a public one and by it power is given to public officers which affect the rights of third persons the word "may" is to be read "shall". Moreover, to reach a conclusion as to constitutionality the word "may" in a statute is to be read as "shall" if such a reading leads to constitutionality [citations omitted]. 23 A.2d at 879.

In the instant cases the court was clearly dealing with a

matter of public interest; and, therefore it was obligated to interpret "may" as "shall."

While the statutory language is the starting point to ascertain the meaning of a statute this Court can also consider the circumstances of the enactment of the legislation, *Watt v. Alaska*, 451 U.S. 259, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981).

42 Pa.C.S.A. § 8371 was part of the Act 6 revisions to the Motor Vehicle Financial Responsibility Law, 75 P.S. § 1701, *et seq.*, which was passed to replace the Pennsylvania No-Fault Motor Vehicle Insurance Act, 40 P.S. § 1009.101, *et seq.* Those laws sheds light on the intent of the Legislature in passing § 8371.

The Pennsylvania No-Fault Motor Vehicle Insurance Act, in § 106(a)(1) (J/A at 1824) provided "[o]verdue payments bear interest at the rate of eighteen percent (18%) per annum." Section 107 (J/A at 1825) authorized attorneys fees if "(1) [i]f any overdue no-fault benefits are paid . . . after receipt . . . of notice of representation"; and, "(3) [i]f . . . the court determines that the obligor has denied the claim or any significant part thereof without reasonable foundation . . ." The Motor Vehicle Financial Responsibility Law retained those provisions, in a modified form. Section 1716 provided "[o]verdue payments shall bear interest at the rate of twelve percent (12%) per annum . . ."; and also authorized attorneys fees if "the insurer is found to have acted in an unreasonable manner in refusing to pay the benefit due . . ." Section 1798 (J/A at 1823) also authorized attorneys fees if "an insurer is found to have acted with no reasonable foundation in refusing to pay the benefit [due] . . ."

The Act 6 revisions to the Motor Vehicle Financial Responsibility Law made no change to either provision, thereby reaffirming that interest was payable on overdue

benefits; and, that attorneys fees were to be awarded if the claims for benefits due under the Motor Vehicle Financial Responsibility Law were refused with no reasonable foundation.

Act 6, in addition to give all insureds a right to recover punitive damages, was intended to extend the rights of insureds under automobile insurance policies to all insureds.

A comparison of the rights to interest and counsel fees under the Acts shows:

	Interest	Attorney's Fee
No-Fault Act	Overdue	On overdue benefits Without reasonable foundation
Financial Resp. Law	Overdue	Unreasonable refusal No reasonable foundation
Action on Ins. Policy	Bad Faith	Bad Faith

If the plaintiff's claim was based on an automobile policy interest would due if the payment was overdue. And, the right to attorney's fees, initial due if the payment were overdue, would now be payable if the failure to pay was unreasonable.

While the Pennsylvania Legislature chose to require proof of bad faith conduct before allowing an award of interest, counsel fees and costs in a non-motor vehicle case, once it was proven that the insurer was guilty of bad faith it was the clearly the Legislature's intention that awards of interest, counsel fees and costs be made.

To hold otherwise is to hold that the Pennsylvania Legislature intended there be substantially differ treatment of insurers, depending on the type of coverage written. If a motor vehicle insurer was found to have acted with no reasonable foundation it would be required to the fully indemnify its insured, *i.e.*, it would also be required to pay the interest and attorney fees. But, if a non-motor vehicle insurer acted in bad faith it might not be required to pay interest or attorney fees.

It is respectfully submitted such an interpretation leads to an illogical and absurd result. A legislative mandate cannot and should not be thwarted by an interpretation by the court that produces a result not contemplated or intended by the Legislature, *Orawsky v. Jersey Central Power and Light Co.*, 472 F. Supp. 881 (E.D. Pa. 1977). What might appear to be the plain meaning of a statute must yield if it such an meaning is unreasonable or contrary to the statutory purpose or legislative intent, *United Parcel Service v. U.S. Postal Service*, 455 F. Supp. 857 (E.D. Pa. 1978), *aff'd*, 604 F.2d 1370 (3rd Cir. 1979), *cert. denied*, 446 U.S. 957, 100 S. Ct. 2929, 64 L. Ed. 2d 815 (1980).

In these cases the finding of bad faith by the jury meant that Petitioners were entitled to awards interest, counsel fees and costs. Only the lower courts erroneous interpretation of the Act as granting it unfettered discretion enabled it to refuse to follow the legislative mandate. But if the Act is so interpreted it is unconstitutional.

CONCLUSION

For all of the reasons set forth above, the Petitioners, Younis Bros. & Co., Inc. and The Abi Jaoudi and Azar Trading Corporation, respectfully request that this Honorable Court issue an order granting a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED JULY 30, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1905

YOUNIS BROS. AND CO., INC.

V.

CIGNA WORLDWIDE INSURANCE COMPANY

THE ABI JAOUDI AND AZAR TRADING CORPORATION

V.

CIGNA WORLDWIDE INSURANCE COMPANY; WHISTONDALE & PARTNERS, INC., aka WHISTONDALE & PARTNERS, P.L.C.; GALLAGHER PLUMER, LTD.; EAGLE STAR INSURANCE CO. LTD.; CNA REINSURANCE OF LONDON LTD.; ST. PAUL FIRE AND MARINE INSURANCE COMPANY, (UK Ltd.); ORION INSURANCE CO. PLC.; NRG FENCHURCH INSURANCE CO. LTD.; U A P INS. CO.; GENERALI INS. CO.; SIRIUS (UK) INSURANCE PLC; YASUDA TRUST EUROPE LTD.; MUNICHRE GENERAL SERVICES LTD., dba GREAT LANES RE-INSURANCE, LTD. (UK); COMMERCIAL UNION ASSURANCE COMPANY PLC; CONTINENTAL INSURANCE CO. (UK) LTD., dba CONTINENTAL ASSURANCE CO. OF LONDON, LTD.; STAR ASSURANCE SOCIETY, LTD.; ROYAL RE-INSURANCE CO. LTD.; HIR UK LTD.

Younis Bros. 7 Co., Inc. and The Abi Jaoudi and Azar Trading Corporation, Appellants

Appendix A

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil Nos. 91-06784, 91-06785)

Submitted under Third Circuit LAR 34.1(a)
on June 4, 1996

Before: COWEN, NYGAARD and LEWIS, *Circuit Judges*

(Opinion Filed July 30, 1996)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

Younis Brothers & Company and the Abi Jaoudi and Azar Trading Corporation appeal the judgment as a matter of law in

favor of appellee, CIGNA Worldwide Insurance Company. The district court concluded that the "war risk exclusion" contained in appellants' insurance policies precluded claims arising from the June 1990 Liberian insurrection. We will affirm.

I.

The district court's opinion details the facts underlying this appeal. *See Younis Bros. & Co. v. CIGNA Worldwide Ins. Co.*, 899 F.Supp. 1385, 1388-1393 (E.D. Pa. 1995). We need not repeat them except to note that appellants owned businesses and properties in Liberia, which, between June and October 1990, were damaged by looting and fire. During the time Charles Taylor and Prince Johnson led separate armies against the Liberian government. Appellants' holdings were insured under CIGNA policies containing war risk exclusions for losses caused by, *inter alia*, war, civil war, insurrection, rebellion or revolution. CIGNA carried the burden of establishing that the situation within Liberia fell within the war risk exclusions.

Following a jury trial on appellants' declaratory judgment action, the district court entered judgment as a matter of law in favor of CIGNA, holding that Liberia experienced an insurrection during the relevant time period. We must decide whether the record contains that minimum quantum of evidence from which a jury might reasonably afford relief. *See e.g., Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir. 1978). We conclude that a state of insurrection existed in Liberia during the relevant time period; and, that the insurrection caused appellants' losses.

Appendix A

II.

"Insurrection" is the most basic form of civil unrest, the definition of which encompasses all other forms of civil commotion addressed by the war risk exclusions in appellants' policies. *See Pan Am. World Air., Inc. v. AETNA Casualty & Sur. Co.*, 505 F.2d 980, 1017 (2d Cir. 1974). We adopt the definition of "insurrection" articulated by the First Circuit of Appeals in *Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954):

> [T]o constitute an insurrection of rebellion within the meaning of these policies, there must have been a movement accompanied by action specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof.

Accord Pan Am., 505 F.2d at 1017-1019 (defining insurrection as (1) a violent uprising by a group or movement (2) acting for the specific purpose of overthrowing the government and seizing its powers).

No one questions that Charles Taylor and Prince Johnson led their respective armies in a violent uprising. The record further reveals that one or both of them intended to overthrow the government and seize power. Numerous witnesses testified as to objective manifestations of the intent, while there is not a scintilla of evidence to suggest some other goal. The evidence permits no interpretation other than that, from June to October 1990, when appellants' losses occurred, the events in Liberia constituted an insurrection within the meaning of the war risk exclusion clauses in the CIGNA policies.

Appendix A

Close review of the record further reveals that the district court properly ruled that the insurrection caused appellants' losses within the meaning of the CIGNA policies. As the district court noted, the total breakdown of civil authority caused by the insurrection compounded the looting and other damage. Numerous witnesses testified that the breakdown of civil authority, the looting and the damage were caused by the insurrection, and that soldiers under Taylor and Johnson participated in the looting and destruction. In contrast, there is no evidence that the damage caused to appellants' businesses resulted from anything other than the insurrection.

III.

The district court correctly entered judgment as a matter of law that an insurrection both existed in Liberia during the relevant time period and caused the losses suffered by appellants. Accordingly, we will affirm.[1]

---

1. Appellants have made other allegations of error. We have considered them and conclude both that they have no merit, and that our decision thereon requires no elaboration.

APPENDIX B — MEMORANDUM OPINION AND ORDERS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED SEPTEMBER 18, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 91-6784

YOUNIS BROS. & CO.

v.

CIGNA WORLDWIDE INSURANCE COMPANY

CIVIL ACTION

NO. 91-6785

THE ABI JAOUDI AND AZAR TRADING CORPORATION

v.

CIGNA WORLDWIDE INSURANCE COMPANY

MEMORANDUM

O'Neill, J. September 15, 1995

I. *Introduction*

With respect to the procedural history of these cases reference is made to this Court's November 16, 1994 memorandum reported at *Younis Bros. & Co., Inc. v. Cigna Worldwide Ins. Co.*, 882 F. Supp. 1468 (E.D. Pa. 1994).

Appendix B

Currently before the Court are the post-trial motions of the parties.

Defendant CIGNA argues that the following entitle it to judgment as a matter of law:

> 1. The suit limitation clause contained in the fire policies issued by defendant to plaintiffs bars plaintiffs' claims with respect to those policies.
>
> 2. Plaintiffs failed to make out a prima facie case establishing their right to coverage under the insurance policies;
>
> 3. The war risk exclusion provisions contained in the policies bar plaintiffs' claims;
>
> 4. Neither defendant's refusal to pay plaintiffs' claims nor its manner of investigating those claims can constitute bad faith under 42 Pa. S.C.A. § 8371.

Defendant argues that the following entitle it to a new trial on plaintiffs' contract and bad faith claims:

> 5. The Court committed reversible error in instructing the jury with respect to ambiguity in the insurance contracts;
>
> 6. The Court committed reversible error in instructing the jury with respect to plaintiffs' alleged fraud and noncooperation.

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Defendant also asserts the following:

> 7. The Court's decision to allow plaintiff AJA to assert its Harbel fire loss claim constituted reversible error;
>
> 8. AJA forfeited fire loss coverage with respect to the Harbel location by violating the notice provision contained in the Harbel fire policy.

Plaintiffs argue that they are entitled to a new trial as to those issues upon which they did not prevail because plaintiffs were prejudiced by this Court's determination:

> 1. Not to disqualify the jury panel due to the allegedly improper voir dire and striking of minority persons from the jury pool by defendant's counsel.[1]
>
> 2. Failing to rule that as a matter of law the suit limitation policy contained in the fire policies did not bar their suit;
>
> 3. Failing to rule as a matter of law that the coverage limits of the policies were those amounts contained in the policies' renewal endorsements;
>
> 4. Limiting plaintiffs' cross-examination of defendant's witness John Smith;

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1. A favorable ruling on this motion presumably would require a new trial on all issues, not the limited new trial sought by plaintiffs.

5. Failing to compel defendant to produce unredacted copies of reports which defendant introduced into evidence;

Plaintiff AJA argues that the Court erred by:

6. Failing to rule as a matter of law that — with respect to AJA's fire and burglary policies — defendant was liable for the entire amount of coverage stated in the renewal endorsements;

7. Refusing to award plaintiff AJA partial judgment in the amount of the damages stipulated at the Harbel supermarket and warehouse, the Randall Street supermarket and wholesale warehouse, the Freeport administrative offices and bonded warehouse and the Old Road manager's residence;

8. Incorrectly charging the jury with respect to the issue of plaintiff AJA's alleged fraud.

Plaintiff Younis argues that with respect to its bad faith claim pursuant to 42 Pa. S.C.A. § 8371 the Court erred by:

9. Failing to permit the jury to determine whether Younis was entitled to recover interest, counsel fees and costs and the amount of those sums;

10. Excluding testimony regarding defendant's conduct;

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> 11. Charging the jury that it could award punitive damages against defendant only if it first determined that defendant's actions were outrageous and permitting the jury to hear additional evidence regarding defendant's conduct after the jury had determined that defendant had acted in bad faith;
>
> 12. In failing to incorporate findings of facts in this Court's memorandum dated November 16, 1994 and in failing to award Younis damages pursuant to § 8371.

Plaintiff Younis also argues that this Court erred in refusing to award Younis expenses which it incurred allegedly due to defendant's actions.

II. *Discussion*

Motion For Judgment Nov

Defendant seeks judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. Rule 50(b) which provides:

> Whenever a motion for a judgment as a matter of law made at the close of all evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to the later determination of the legal questions raised by the motion. . . . [I]f a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to

> stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

The Court of Appeals has held that "[w]hen deciding a motion for judgment n.o.v., the trial judge must determine whether the evidence and the justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict." *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259 (3d Cir. 1987) [citing *Berndt v. Kaiser Aluminim & Chem. Sales, Inc.*, 789 F.2d 253 (3d Cir. 1986)], *cert. denied*, 488 U.S. 1004 (1989). The standard is the same whether the motion is one for a directed verdict or for judgment n.o.v. The standard for granting a Rule 50 motion is also identical for the trial court and upon appeal. *See Gilpin v. Langan*, 789 F.2d 1034 (3d Cir. 1986). With respect to that standard the Court of Appeals has stated that the court:

> must examine the record in a light most favorable to [the verdict winner], and review the specific evidence in the record and all inferences reasonably capable of being drawn therefrom. [The court] must determine whether, as a matter of law, the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief. . . . [I]t should be granted sparingly and circumspectly. Nevertheless the federal

> courts do not follow the rule that a scintilla of evidence is enough. The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party.

Patzig v. O'Neil, 577 F.2d 841, 846 (3d Cir. 1978) (citations and quotations omitted).

Suit Limitation Clause

Each of the fire policies issued by defendant to plaintiffs contains a suit limitation clause which provides:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity ... unless commenced within twelve months next after inception of the loss.

Plaintiffs filed suit on all claims except the Harbel market fire loss claim on October 31, 1991. Plaintiff AJA first asserted its Harbel claim during trial (February 1994) and defendant argues that I abused my discretion in permitting AJA to assert the claim at that time. It is not disputed that each of plaintiffs' fire losses occurred before October 30, 1990.

Plaintiffs argue that their claims are not barred because (1) the closure of Liberian courts between June 29, 1990 and November 4, 1991 voided the suit limitation clauses; and (2) the actions of defendant's agents and employees estop defendant

from asserting the clauses as a defense. Plaintiff AJA also argues that this Court acted properly when it allowed AJA to amend its pleadings to assert its Harbel market fire loss.

Upon review of the record and of the authorities cited by the parties I conclude that — excluding the Harbel market fire claim — the suit limitation clauses do not bar plaintiffs' fire loss claims. Because of my determination with respect to defendant's war risk exclusion defense I need not address the propriety of my decision to permit plaintiff AJA to assert its Harbel market fire loss claim; any references to plaintiffs' "losses" or "claims" in the following suit limitation discussion excludes the Harbel market fire claim.

Plaintiffs assert that disputes involving the suit limitation clauses are controlled by Liberian law which looks to American common law.[2] The parties agree that there is no conflict between Liberian law and Pennsylvania common law on this issue.

In *Semmes v. Hartford Ins. Co.*, 80 U.S. 158 (1871), the Supreme Court determined the effect of a twelve month suit limitation clause when a citizen of Mississippi brought suit against a Connecticut insurance company in 1866 for coverage on a loss sustained in 1860. The Court held that the Civil War, which it described as a war between the countries in which the parties resided, imposed a disability on plaintiff which "relieve[d] him from the consequences of failing to bring suit

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2. Plaintiffs may have abandoned this position by asserting at oral argument that I am not bound by the recent Liberian Supreme Court decision *Picasso Cafeteria & Spanish Gallery v. Mano Ins. Corp.*, July 28, 1995, 44-55, wherein the Liberian Supreme Court determined that a civil war existed in Liberia at the time the plaintiffs in these cases sustained their losses.

within twelve months after the loss, because it rendered a compliance with that condition impossible and removes the presumption which that contract says shall be conclusive against the validity of the plaintiff's claim." *Id.* at 161. Since the suit limitation provision was a term negotiated by the parties and not a legislatively enacted statute of limitations the Court held that the plaintiff's claim was timely because it was brought within the applicable statutory period. *Id.*

The suit limitation provisions in the present fire policies are required by Pennsylvania law to be included in all policies insuring property within the Commonwealth. However, the insured property in the present case was located in Liberia and the policies were issued there; therefore, I will regard the limitations as part of a private agreement between the parties, as was the case in *Semmes*.

This case is not factually on all fours with *Semmes*. Liberia was not at war with the United States; Mr. Semmes had no access to the courts in the United States whereas plaintiffs did; Mr. Semmes remained in Mississippi — the principals of plaintiffs, who were Lebanese nationals, fled to Lebanon; and *Semmes* does not reveal that the insured's property was in an area ravaged by war as was plaintiffs' property (see discussion hereinafter). But *Semmes* and other cases,[3] although involving differing facts, are instructive because they have a common

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3. *Cf. Osbourne v. United States*, 16 F.2d 767 (2d Cir. 1947) (statute of limitations equitably tolled where plaintiff was held in Japan during the Second World War and therefore unable to file his claim in court); *First Nat. Bank of Pittsburgh v. Anglo-Oesterreichische Bank*, 37 F.2d 564 (3d Cir. 1930) (statute of limitations will not run against alien enemy while courts are closed to him).

thread: they all focus on the disability inevitably imposed on a war-affected claimant who is required by contract or statute to institute suit within a specific period of time.

The present policies are silent upon the question where suit may or must be brought. However, where a policy insures property located in a foreign country and is issued in that country surely it is not unreasonable to conclude that the parties contemplated that a local forum would be available to the insured if the need arose to assert a claim. Given the havoc which prevailed in Liberia during the pertinent time period (see discussion hereinafter) it is questionable whether plaintiffs were in a position to secure the information needed to file a claim and institute suit within the twelve month period. In any event, defendant drafted the policies. If it wished to impose the draconian requirement that when the judicial system of the locus country is shut down foreign insureds must sue in the United States or forfeit their claims, defendant could, and should, have said so explicitly. I conclude the plaintiffs' claims are not barred by the suit limitation provisions.

War Risk Exclusion

CIGNA argues that it is entitled to judgment because the evidence viewed in the light most favorable to plaintiffs establishes as a matter of law that: (1) an insurrection or civil war existed in Liberia at the time plaintiffs sustained their losses; and (2) the insurrection or civil war caused plaintiffs' losses within the meaning of the war risk exclusion contained in plaintiffs' policies. Plaintiffs respond that: (1) the evidence does not establish defendant's contentions as a matter of law; and (2) the language contained in my charge — to which defendant did not object — permitted the jury to find in plaintiffs' favor based upon the evidence presented at trial.

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As an initial matter I conclude that plaintiffs' second argument is without merit. The fact that the jury returned a verdict in favor of plaintiffs consistent with a charge that was not objected to does not establish that the verdict was supported by the minimum quantum of evidence which Rule 50 requires. The failure of a party to object to a jury instruction does not make that instruction the law of the case. *See* Wright & Miller, Federal Practice and Procedure 2d § 2537. This Court must determine whether the evidence could have supported a jury verdict with respect to a properly formulated charge whether or not such a charge was delivered to the jury. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 513-14 (1988).

The entry of judgment n.o.v. in favor of defendant insurance company is inappropriate if ambiguity exists in a dispositive provision of an insurance contract which defendant drafted and a permissible interpretation of the ambiguous clause would permit a jury to find in favor of plaintiff. Under federal law "[i]t is for the court, as a matter of law, to determine whether ambiguity exists in a contract." *Kiewit Eastern Co. v. L & R Constr. Co.*, 44 F.3d 1194, 1199 (3d Cir. 1995) [citing *Hutchison v. Sunbeam Coal Corp.*, 519 A.2d 385, 390 (Pa. 1986)]. Under Pennsylvania law a provision of a contract is ambiguous if its terms are susceptible to more than one interpretation.[4]

The fire policies and the extended coverage endorsements appended to the policies provide that defendant is liable for fire damage generally and for burglary and looting directly caused by riot and civil commotion. The fire policies also provide that defendant is not liable for:

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4. None of the parties asserts the Liberian law differs from Pennsylvania law in this respect.

> loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the Insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for theft.

CIGNA Fire Policy, lines 10-24. In addition, plaintiff AJA maintained a burglary policy, an accounts receivable policy and a money and securities policy. Each of these policies contained a war risk exclusion clause. AJA's burglary policy and the money and securities policy excluded "loss due to war . . . civil war, insurrection, rebellion, revolution. . . ." CIGNA Merchantile Open Stock Burglary Policy, ¶(b); CIGNA Money and Securities Policy, Exclusions, ¶(e). AJA's accounts receivable policy excluded coverage for losses "caused by or resulting from . . . insurrection, rebellion, revolution, civil war, usurped power CIGNA Accounts Receivable Policy. Exclusions, ¶(g).

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In *TRT/FTC Communications, Inc. v. Insurance Co. of Pennsylvania, Inc.*, No. 91-30, 1991 U.S. Dist. LEXIS 11925 (D. Del. Aug. 6, 1991) at *6, *aff'd*, 9 F.3d 1541 (3d Cir. 1993), the Court determined that a similar war risk exclusion provision — appearing in an all-risk property insurance contract governed by California or Washington law — was clear and unambiguous. That policy language was as follows:

> This policy does not insure against loss or damage caused by or resulting from:
>
> 1) Hostile or warlike action in time of peace or war, including action in hindering, combating, or defending against an actual, impending or expected attack (A) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (B) an agent of any such government, power, authority or forces;
>
> * * *
>
> 3) Insurrection, rebellion, revolution, civil war, usurped power, acts of terrorism, sabotage, or action taken by governmental authority in hindering, combating or defending against such occurrence, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

Id. at *6-7.

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In my view the *TRT* Court's holding does not conflict with the district court determination affirmed in *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 1005 (2d Cir. 1974). In *Pan American* the defendant insurance company asserted in the alternative that plaintiff's loss resulted from one of the conditions covered in three separate clauses of the war risk exclusion contained in plaintiff's policy. One of those clauses excluded coverage in the case of "war, . . . civil war, revolution, rebellion, insurrection or warelike operations, whether there be a declaration of war or not." Noting that defendant claimed — in the alternative -- that a number of exclusion clauses barred plaintiff's claim the Court of Appeals for the Second Circuit concluded that "we can infer from [defendant's] reliance on so large a number of exclusions that the all risk insurers recognize that each of the exclusions is ambiguous or has only uncertain application to the facts." *Id.* at 1005.

The concepts of ambiguity and vagueness are distinct. As one commentator has reasoned:

> a word is vague to the extent that it defines not a neatly bounded class but a distribution about a central norm. Thus the world *green* is vague to the extent that it shades into yellow at one extreme and into blue at the other, so that its applicability to marginal situations is uncertain. Ambiguity is an entirely distinct concept. A word may have two entirely different connotations, so that it may be at the same time both appropriate and inappropriate. Thus the world *light* is ambiguous when considered in the context of dark feathers.

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E. Allen Farnsworth, Contracts, § 7.8 (1982) (citations and footnotes omitted) (emphasis in original). I read the *Pan American* Court's use of the phrase "has only uncertain application to the facts" to mean that some of the exclusion provisions may have been vague rather than ambiguous.

I conclude that the *Pan American* Court did not consider the term "insurrection" ambiguous because — consistent with the clear weight of authority — the Court defined the term as a violent uprising by a group or movement acting for the specific purpose of overthrowing the constituted government and seizing its powers. *Pan American,* 505 F.2d at 1017; *see Holiday Inns, Inc. v. Aetna Ins. Co.,* 571 F. Supp. 1460, 1487 (S.D.N.Y. 1983); *see also Home Ins. Co. of New York v. Davila,* 212 F.2d 731, 736 (1st Cir. 1954) (an insurrection occurs where a movement acts to overthrow the constituted government and to take possession of its inherent powers). My inquiry into whether plaintiffs' claims are barred by the war risk exclusion provisions will focus on whether an "insurrection" existed in Liberia at the time plaintiffs' suffered their losses because "insurrection" is the most rudimentary form of the type of civil commotion which in progressive stages may become "rebellion," "revolution" and "civil war." *See Pan American,* 505 F.2d at 1017; *Davila,* 212 F.2d at 736.

The parties agree that Liberia experienced political and social turbulence during 1989 and 1990. Between June and October of 1990 plaintiffs suffered losses to insured property located in Monrovia and Harbel. The issue before this Court is whether as a matter of law that turbulence rose to the level of insurrection as defined in the war risk exclusion provisions contained in the insurance policies and if it did whether that insurrection was responsible for plaintiffs' losses as causation

is defined in those provisions. Defendant bears the burden of establishing that its war risk exclusion applies to plaintiffs' claims.

In 1989 Charles Taylor led an armed movement that challenged the civil authority of the Liberian government headed by President Samuel Doe. In early 1990 Taylor's forces split into two factions; the National Patriotic Front of Liberia (NPFL) headed by Taylor and the Independent National Patriotic Front of Liberia (INPFL) headed by Prince Johnson, a former Taylor follower. Defendant's witnesses testified that they heard both Taylor and Johnson state an intention to overthrow the government of President Doe. Manchester Guardian correspondent Mark C. Huband testified that he met with Taylor and that Taylor "stated very clearly . . . that his aim was to rid the country of the government of Samuel Doe and to replace it with himself as head of state." Further, a witness presented by plaintiffs — Peter Jallah, Director of Economic Crime Investigation Department, Liberian Ministry of Justice — testified that he heard Taylor speak on BBC radio about overthrowing the Doe government.

In early June, Taylor's forces engaged government troops near Harbel and subsequently established control over the town which is thirty-five miles from Monrovia. By July, 1990 forces under Charles Taylor and Prince Johnson engaged government forces in and around Monrovia. In August, 1990 the Economic Community of West African States (ECOMOG) despatched six thousand troops to Monrovia to establish a cease fire between the government and the rebel factions. On September 9, 1990 Johnson's forces captured President Doe who subsequently was killed. By October 1990 ECOMOG forces gained control of Monrovia. On November 22, 1990 a national unity government headed by Interim President Amos Sawyer took office. By

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February, 1991 a cease fire agreement between Taylor, Johnson and ECOMOG had been signed.

During this conflict United States Marines evacuated American citizens from Monrovia and the Liberian courts closed. The police and fire departments in Monrovia sharply curtailed their normal level of operations after June 27, 1990 when government troops fired upon a peace demonstration in Monrovia. The evidence also indicates that at lease some of the damage plaintiffs suffered was caused by armed men who appeared to be soldiers.

After reviewing the record in a light most favorable to plaintiffs, I conclude that the evidence establishes — as a matter of law — that the events which occurred in Liberia between late 1989 and February 1991 constituted — at least — an insurrection. CIGNA, therefore, is not liable to plaintiffs for any damage which is attributable to the insurrection under the causation language contained in the policies.

The war risk provisions contained in the various policies provide that defendant is not liable for losses which are "directly or indirectly caused by insurrection . . .", loss due to . . . insurrection . . . or "caused by or resulting from . . . insurrection. . . ." such language has been judicially interpreted to articulate a unique proximate cause test excusing an insurance company from providing coverage to its insured if the insurrection was the efficient cause or the predominant and determining cause of the lose. *See Standard Oil Co. v. United States,* 340 U.S. 54, 55 n.1 (1950) (construing a policy that excluded from coverage "all consequences of hostilities or warlike operations"); *Pan American,* 505 F.2d at 1006 (construing a provision that excluded damage "due to or

resulting from" under the *Standard Oil* standard). Such cause need not be the cause nearest in time or place to the loss but must be "that cause which is most nearly and essentially connected with the loss as its efficient cause." *See Standard Oil*, 340 U.S. at 58; *Insurance Co. v. Boon*, 95 U.S. 117 (1877); *see also TRT/FTC Communications, Inc. v. Insurance Co. Pennsylvania, Inc.*, No. 91-30, 1991 U.S. Dist. LEXIS 11925 (D. Del.Aug. 6, 1991), *aff'd*, 9 F.3d 1541 (3d Cir. 1993) (looting is caused by military hostilities if the looting was "enabled" by those hostilities and would not have otherwise occurred).

Courts hold that the efficient cause standard is not susceptible to mechanical application but requires "common sense and reasonable judgment as to the source of the loss alleged." *Blaine Richards & Co., Inc. v. Marine Indemn. Ins. Co. of America*, 635 F.2d 1051, 1054 (2d Cir. 1980); *see also Ope Shipping, Ltd. v. Allstate Ins. Co., Inc.*, 521 F. Supp. 342, 349 (S.D.N.Y. 1981), *aff'd in part*, 687 F.2d 639 (2d Cir. 1982), *cert. denied sub nom., Underwriter at Lloyds v. Ope Shipping*, 460 U.S. 1069 (1983); *Diamond Shamrock Chemicals Co. v. Aetna Casualty & Surety Co.*, 609A.2d 440 (N.J.Super. 1992), *cert. denied*, 634A.2d 528 (1993).As the Court in *International Dairy Eng'g Co. of Asia, Inc. v. American Home Assurance Co.*, 352 F.Supp. 827, 828 (N.D.Cal. 1970), noted in the context of marine insurance, standard war risk exclusion clauses

> reflect[] the general recognition that war creates perils vastly greater than and different from ordinary . . . risks and that such risks are expected to be covered by separate war risk insurance which has a premium schedule commensurate with the greater risks.

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The evidence establishes that rebel forces fought government troops in and around Harbel in late May and early June, 1990. The AJA supermarket at Harbel was looted sometime between June 5 and 8, 1990. At one point during this fighting rebel troops forced their way into the supermarket at Harbel and forced it to close. No witness observed the actual looting of the supermarket but a witness testified that he passed the supermarket on June 5 or 6 while transporting fuel for rebel troops and noticed that it had been broken into. AJA employees left Harbel between June 8 and June 14. When one of the employees returned to the supermarket in July or August he observed that it had been broken into and observed dead bodies lying inside.

I conclude as a matter of law that the looting and damage of the AJA Harbel supermarket would not have occurred in the absence of the insurrection that gripped Liberia in 1990 and that that insurrection was the efficient cause of the looting and damage to the supermarket.

Plaintiffs' properties in Monrovia sustained damage between August 19 and October 30, 1990. Evidence established that rebel factions under Charles Taylor and Prince Johnson clashes with government and ECOMOG troops in and around Monrovia from July through the end of October, 1990. On September 9, 1990, rebel forces captured President Doe. After October 1990 ECOMOG peacekeeping forces gained control of Monrovia and Doctor Amos Sawyer was installed as Interim President on November 22, 1990. The police and fire departments in Monrovia ceased functioning in late June, 1990. The courts in Monrovia closed and water and electrical service was curtailed. Several witnesses testified to the general lawlessness which gripped Monrovia after the collapse of civil authority.

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It is uncontroverted that plaintiffs' properties were damaged during this time. Some of the properties appear to have been looted by men wearing military uniforms and some appear to have been looted by groups of civilians. Witnesses also testified that many businesses in Monrovia were looted and damaged by fire during this period as soldiers and civilians sought food and other necessities. During this period Monrovia also contained a substantial population of refugees. One witness testified that he observed people eating grass and another testified that after joining a rebel faction he repeatedly broke into plaintiff AJA's Freeport warehouse with other rebel soldiers to loot the warehouses contents.

I conclude as a matter of law that the looting and damage of plaintiffs' properties by both soldiers and civilians was the direct result of the insurrection that gripped Liberia in 1990 and that this looting was compounded by the breakdown of civil authority in Monrovia which was itself directly caused by the insurrection. I therefore conclude that the insurrection that existed in Liberia in 1990 was the efficient cause of the losses plaintiffs sustained to their Monrovia property.

Accordingly, I conclude that defendant is entitled to judgment n.o.v. under the war risk exclusion clauses contained in the policies with respect to plaintiffs' claims in both Harbel and Monrovia.

Alternatively, I reach the same result applying Liberian law. On July 28, 1995, the Liberian Supreme Court issued its opinion in *Mano Ins. Corp. v. Picasso Cafeteria and Spanish Gallery*, July 28, 1995, 44-55, which reversed a lower court's determination that losses sustained to the Picasso Cafeteria and Spanish Gallery on June 25, 1990 resulted from looting and vandalism and were recoverable under specified peril policies

which covered losses from burglary as evidenced by forcible entry and losses from civil commotion. To support its claim the Picasso Cafeteria and Spanish Gallery submitted a police confirmation/clearance dated July 4, 1991 stating that a Mr. Padilla "reported that Picasso Cafeteria & Restaurant located on Center Street, City of Monrovia was burglarized/looted and damaged during the civil commotion." *Id.* at 53. The Picasso policies did not contain war risk exclusions.

The Liberian Supreme Court — appearing to adopt a rule that differs from the majority rule in the United States — held that the Picasso Cafeteria and Spanish Gallery had failed to prove that its losses occurred as a result of burglary or civil commotion because the losses occurred during hostilities in Monrovia that amounted to a civil war. The Supreme Court stated:

> We take it that . . . the reported injury took place during the civil commotion, according to the police report. The question then is whether what have had in the country is a civil commotion or a civil war. We have witnessed an armed struggle between opposing and contending forces for the control of the government as opposed to an uprising of citizens or a mere insurrection. To our mind the civil conflict was an armed one between opposing and contending forces; and so we have a situation of a civil war and not a civil commotion. The loss sustained by [the Picasso Cafeteria and Spanish Gallery] therefore arose from the general effects of the civil war when the . . .

> premises were burglarized/looted. The [insurance company] has averred that the damage suffered by the [insured] grew from the civil war and that the policies carry no war coverage. The records support this position . . . which impels us to hold that the [insured's] claim does not find support under the Cafeteria policies.

Id. at 54. In so holding the Liberian Supreme Court appears to hold that the terms civil commotion, insurrection and civil war describe events which neither coexist nor overlap.

In *Mano*, the Liberian Supreme Court also adopted a broad formulation of proximate cause in a specified peril policy that did not cover war loss and denied an insured coverage for all property losses that "arose from the general effects of the civil war." *Id.*

Insurer Bad Faith

In 1990, the Pennsylvania Legislature created a statutory cause of action against insurers who act in bad faith toward their insureds. That statute, which became effective on July 1, 1990, and is codified at 42 Pa.C.S.A. § 8371, provides:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by

the insured in an amount equal to the prime rate of interest plus 3%.

(2) Award punitive damages against the insurer.

(3) Assess court costs and attorney fees against the insurer.

There is no legislative history that specifically concerns this statute, which was enacted as part of a comprehensive insurance bill.

To prevail in a claim brought pursuant to § 8371 an insured "must show that the defendant did not have a reasonable basis for denying benefits under the policy and that the defendant knew or recklessly disregarded its lack of reasonable basis in denying the claim." *Terletsky v. Prudential Property & Casualty Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. 1994) (citations omitted). Further, Pennsylvania courts hold that a plaintiff must establish bad faith by clear and convincing evidence. *See id.* (citations omitted).

Defendant argues that as a matter of law its decision to deny plaintiffs' claims cannot constitute bad faith. In view of my conclusion that the war risk exclusion clause contained in the policies bars plaintiffs claims, I agree.[5]

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5. I have previously addressed defendant's argument that § 8371 is unconstitutional and concluded that: (1) § 8371 is constitutional; (2) in a federal court action pursuant to § 8371 a party is entitled to a jury trial with respect to a claim for punitive damages but not with respect to the other remedies available under the statute; and (3) plaintiffs were not entitled to an award of interest and counsel fees pursuant to § 8371. *See Younis Bros. &*

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The courts which have dealt with § 8371 have not clearly defined the circumstances under which an insurer's handling of a claim may give rise to § 8371 liability.[6] Courts have held that the Legislature enacted § 8371 to curtail bad faith practices on the part of insurers by affording insureds a cause of action that is separate and independent from the claim on the insurance contract. *See Hofkin v. Provident Life & Accident Ins. Co.*, No. 93-1044, 1995 U.S. Dist. LEXIS 9447 at *19-20 (E.D. Pa. June 30, 1995); *Margolies v. State Farm Fire & Casualty Co.*, 810 F. Supp. 637, 641-42 (E.D.Pa. 1992) (citations omitted). Claims under § 8371 remain viable even if the statute of limitations has run on the contract claim, *Margolies*, 810 F. Supp. at 641, or if the insured has failed to file suit within the period required by the policy. *Hofkin*, 1995 U.S. Dist. LEXIS 9447 at *19; *March v. Paradise Mutual Ins. Co.*, 646 A.2d 1254 (Pa. Super. 1994), *appeal denied*, 656 A.2d 118 (1995). It is also clear that — at least in some circumstances — an insurer has a "duty of full and complete disclosure as to all of the benefits and ever coverage that is provided by the applicable policy or policies. . . ." *Dercoli v. Pennsylvania Nat. Mutual Ins. Co.*, 554 A.2d 906, 909 (Pa. 1989). *But cf. Hofkin*, 1995 U.S. Dist. LEXIS 9447 at *22-24 (appearing to interpret *Dercoli* to apply to situations where an insurer actually counsels the insured or where the insured is not represented by counsel). In *Polselli v.*

(Cont'd)

Co., Inc. v. Cigna Worldwide Ins. Co., 882 F. Supp. 1468 (E.D. Pa. 1994); *Younis Bros. & Co., Inc. v. Cigna Worldwide Ins. Co.*, No. 91-6784, 1995WL 118211, (E.D. Pa. Mar. 10, 1995).

6. The definition of bad faith adopted by courts in reviewing § 8371 claims is that contained in Black's Law Dictionary, sixth edition, and provides that bad faith "on the part of the insurer is any frivolous or unfounded refusal to pay proceeds of a policy See *Polselli*, 23 F.3d at 751.

Nationwide Mutual Fire Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994), where an insurer was alleged to have acted in bad faith by failing to adjust and pay a claim in a timely manner, the Court of Appeals instructed the district court to consider an insurer's "delay in responding to communications from [its insured], its poor response time in engaging an investigation and in conducting the investigation and its handling of settlement negotiations. . . ." In *Kiewit*, 44 F.3d at 1206 & n.39, however, the Court of Appeals held that because the insurer had no duty to defend or indemnify its insured could not maintain a bad faith cause of action.

No common law action for bad faith conduct by an insurer existed under Pennsylvania law prior to the enactment of § 8371. *See D'Ambrosio v. Pennsylvania Nat. Mutual Casualty Ins. Co.*, 431 A.2d 966 (Pa. 1981). Rather, the Pennsylvania Legislature regulated claim investigation practices through the Unfair Insurance Practices Act which was held to be the exclusive remedy for alleged improper or tortious conduct by an insurer prior to the enactment of § 8371. 40 P.S. §1171.5(a)(10); *see Williams v. State Farm Mutual Auto Ins. Co.*, 763 F. Supp. 121, 123-25 (E.D. Pa. 1991). I find no basis for a conclusion that the Legislature intended to create a broad ranging private enforcement machanism with respect to the handling of claims via § 8371. I therefore conclude that an insurer's investigation and adjustment of a claim does not support an action under § 8371 where an insured's claim for coverage fails upon its merits and the insurer's actions in handling the claim would not have been actionable under Pennsylvania common law prior to the enactment of § 8371.

The Parties' Motions For New Trial

As an initial matter, I conclude that plaintiffs' motion for a

new trial is without merit. The remarks of defendant's counsel regarding his professional history and impending wedding anniversary were unrelated to the issues before the jury and did not taint or prejudice the jury. I will not revisit plaintiffs' claim that defendant's counsel impermissibly used peremptory strikes to disqualify members of the panel on racial grounds because I conclude that I properly addressed and resolved that issue when it was first raised by plaintiffs' counsel. *See Batson v. Kentucky*, 476 U.S. 79 (1986).

Having granted defendant's motion for judgment n.o.v. I am required by Fed. R. Civ. P. Rule 50(c) to rule on defendant's motion for a new trial. Should my grant of judgment n.o.v. be vacated or reversed I would grant defendant a new trial on both the war risk exclusion and the bad faith issue because: (1) I erroneously instructed the jury with respect to ambiguity in the insurance policies prior to the jury's Phase I deliberations; and (2) I conclude that the jury's determinations with respect to the war risk exclusion and bad faith were against the weight of the evidence.

A federal court must look to federal rather than state law "in determining whether, in a contractual dispute, a given issue is to be decided by the trial judge as a matter of law or by the jury or judge as fact finder." *Cooper Laboratories, Inc. v. International Surplus Lines Ins. Co.*, 802 F.2d 667, 671 (3d Cir. 1986); *see also Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 84 (3d Cir. 1960) (in a diversity case the division of functions between the court and the jury is controlled by federal law), *cert. denied, Schenley Indus., Inc. v. Lind*, 364 U.S. 835 (1960). In general, a district court may grant a motion for new trial pursuant to Fed. R. Civ. P. Rule 59 if it determines that the verdict is inconsistent with substantial justice because "the verdict is against the

weight of the evidence; the damages are excessive; the trial was unfair; [or] that substantial errors were made in the admission or rejection of evidence or the giving or refusal of instructions." *Northeast Women's Center, Inc. v. McMonagle*, 689 F. Supp. 465 (E.D. Pa. 1988) *aff'd in relevant part*, 868 F.2d 1342 (3d Cir. 1989); *see also* Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2805; Fed. R. Civ. P. Rule 61 ("[n]o error . . . is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice"). The decision to grant or deny such a motion rests in the discretion of the trial court. *Lind*, 278 F.2d at 88.

When the basis for the motion is an erroneous instruction to the jury a trial court will not normally grant a new trial unless the moving party brought the erroneous instruction to the court's attention at trial. See Fed. R. Civ. P. Rule 51. When the movant seeks a new trial on the basis that the verdict is against the weight of the evidence the trial court is to employ a standard "substantially less demanding than that for judgment as a matter of law." *Lightning Lube, Inc. v. Witco Corp.*, 802 F. Supp. 1180, 1185 (D.N.J. 1992) *aff'd*, 4 F.3d 1153 (3d Cir. 1993). The trial court may consider the credibility of witnesses and weigh the evidence to determine whether a new trial is necessary to prevent a miscarriage of justice. *Roebuck v. Drexel Univ.*, 852 F.2d 715, 736 (3d Cir. 1988); *see* Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2806. The trial court, however, is "not to substitute its own judgment for that of the jury simply because the court might have come to a different conclusion." *Lighting Lube*, 802 F. Supp. at 1186 (quotation and citations omitted). A court granting a new trial merely because of its disagreement with the verdict effects a denigration of the jury system to the extent the judge usurps the prime function of

the jury as the trier of facts. *See id.* (quotation and citations omitted).

In this case defendant strenuously and repeatedly objected to the Court's charge with respect to ambiguity and argued that "[b]efore the jury as fact-finder, could consider whether the policy was ambiguous, the Court had to determine that a possible ambiguity existed." See Defendant's letters of March 14 and March 16, 1994. I ruled against defendant and in accordance with plaintiffs' request charged the jury as follows:

> Now, the insurance policies define many of the terms that are relevant to resolving the dispute between parties, and because the policy constitutes that contract between parties the defining of certain terms in the policy are binding on the parties and binding on you as jurors in deciding the facts in this case.
>
> If you should find that a material term of the policy is ambiguous, you [must] construe or interpret that ambiguity against the defendant and in favor of the plaintiffs.
>
> A term or a provision of an insurance policy is ambiguous if reasonably intelligent persons on considering it in the context of the entire policy could honestly differ as to its meaning.

Charge to Jury, March 18, 1994, at 32. This charge constituted clear error under both federal and Pennsylvania law which

mandates that "[i]t is for the court, as a matter of law, to determine whether ambiguity exists in a contract." *Kiewit*, 44 F.3d at 1199 *citing Hutchinson*, 519A.2d at 390.

In Phase I of its deliberations the jury was required to determine whether; (1) plaintiffs had established that their losses "were direct loss by riot or civil commotion or direct loss from pillage and looting occurring during and at the immediate place of a riot or civil commotion"; and (2) defendant had established that plaintiffs' losses "were cause directly or indirectly by insurrection, rebellion, revolution, civil war or action taken by governmental authority in hindering, combating or defending against such an occurrence." Though charged on the definitions of the terms "insurrection" and "civil commotion" contained in plaintiffs' policies the jury requested further definition of these terms after retiring to deliberate. I did not embellish the definitions provided in my original charge. The jury found for plaintiffs with respect to both questions.

In *Glazer v. Glazer*, 374 F.2d 390 (5th Cir. 1967), *cert. denied*, 389 U.S. 831 (1967), the Court refused to grant a new trial where the trial court instructed the jury on the issue of ambiguity but failed to "specifically state whether it found the contract ambiguous as a preliminary matter." *Id.* at 412. The Court concluded that the submission of the charge to the jury amounted to an "implied recognition of the agreement's ambiguity." *Id.* As I have already concluded that the terms insurrection, rebellion, revolution, civil war or usurped power are not ambiguous, the holding of *Glazer* is not relevant to the present controversy. Further, when I charged I did not intend to recognize that the policy was ambiguous; I intended to do what plaintiffs had urged me to do — that is , to leave it to the jury to determine whether the language of the policy was ambiguous.

Appendix B

As I have stated, in my view the evidence presented to the jury establishes that insurrection, rebellion, revolution or civil war existed in Liberia at the time of plaintiffs' losses and that that insurrection caused plaintiffs' losses within the meaning of the policies. I conclude that the jury's verdict with respect to the war risk exclusion provisions contained in plaintiffs' policies is contrary to the clear weight of the evidence and that should the judgment n.o.v. be vacated or reversed a new trial on that issue and on defendant's alleged bad faith is necessary to prevent a miscarriage of justice.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 91-6784

YOUNIS BROTHERS & CO.

v.

CIGNA WORLDWIDE INSURANCE COMPANY

CIVIL ACTION

NO. 91-6785

THE ABI JAOUDI AND AZAR TRADING CORPORATION

v.

CIGNA WORLDWIDE INSURANCE COMPANY

ORDER

AND NOW this 15th day of September, 1995, for the reasons stated in the accompanying memorandum, judgment is entered against plaintiffs and in favor of defendant with respect to all of plaintiffs' claims. This Order is a final Order with respect to all pending post-trial motions and any other outstanding motions, all of which are DENIED except as provided in the accompanying memorandum.

s/ Thomas N. O'Neill
THOMAS N. O'NEILL, JR., J.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 91-6784

YOUNIS BROTHERS & CO.

v.

CIGNA WORLDWIDE INSURANCE COMPANY

NO. 91-6785

THE ABI JAOUDI AND AZAR TRADING CORPORATION

v.

CIGNA WORLDWIDE INSURANCE COMPANY

ORDER

AND NOW this 18 day of September, 1995, it is hereby ORDERED that:

(1) The second sentence of the first full paragraph on page 15 of this Court's memorandum dated September 15, 1995 is amended to read as follows:

> On June 27, 1990 government troops fired upon a peace demonstration in Monrovia. After that incident the Monrovia police and

fire departments' operations were so curtailed that they essentially ceased to function.

(2) The sentence beginning on line 8 of page 18 of this Court's memorandum dated September 15, 1995 is amended to read as follows:

In late June, 1990 the Monrovia police and fire departments' operations were so curtailed that they essentially ceased to function.

s/ Thomas N. O'Neill
THOMAS N. O'NEILL, JR., J.

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED MARCH 13, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 91-6784

YOUNIS BROTHERS & CO., INC.

v.

CIGNA WORLD WIDE INSURANCE CO.

MEMORANDUM

O'Neill, J. March 10, 1995

I. *Introduction*

Currently before the Court are the filings of the parties with respect to plaintiff's motions for prejudgment interest allowable under Pennsylvania common law and for increased interest and attorney's fees and court costs pursuant to Pa.C.S.A. § 8371.

II. *Background* [1]

Plaintiff brought suit against defendant claiming that

1. For a detailed statement of the procedural history in this case see this Court's Memorandum dated November 16, 1994.

defendant breached a pair of fair insurance policies that it had issued to plaintiff. Plaintiff also alleged that defendant had acted in bad faith toward defendant in violation of Pa.C.S.A. § 8371.

At trial, the jury returned a verdict in favor of plaintiff with respect to the fire insurance policies. I then concluded that because plaintiff sought punitive damages from defendant pursuant to § 8371 the Seventh Amendment of the United States Constitution required me to submit the issue of defendant's alleged bad faith to the jury. I also concluded that plaintiff had no right to submit to the jury the issues of increased interest and attorney fees and court costs available under § 8371. *See* November 16, 1994 Memorandum, at 21-22. I did not provide the jury special interrogatories with respect to defendant's alleged bad faith.

The jury found that defendant had acted in bad faith toward plaintiff. However, because the jury also concluded that defendant's conduct was not outrageous the jury was not required to address the issue of punitive damages.

The parties subsequently briefed and argued defendant's contention that § 8371 is unconstitutional. In my November Memorandum I concluded: (1) that § 8371 is constitutional; (2) that because plaintiff brought its claim in federal court plaintiff was entitled to submit the issue of defendant's bad faith and its claim for punitive damages to the jury; (3) that plaintiff was not entitled to submit to the jury its claim for increased interest and attorney fees and court costs pursuant to the statute.

I now address plaintiff's motions for common law prejudgment interest and for increased interest and attorney fees and court costs pursuant to § 8371.

Appendix C

III. *Legal Standard and Analysis*

In *Howmet Aluminum Corp. v. Hartford Accident and Indemnity Co.*, 665 F.2d 476, 479 (1981) (citations omitted), the Court of Appeals stated:

> The common law rule is that one who owes a sum of money at a date certain is obliged to pay interest for withholding payment. That rule is applicable to insurance contracts. Even a bona fide dispute as to the amount due on the contract is no bar to the accruing of interest.

The common law rate of prejudgment interest in Pennsylvania is six percent. 41 P.S. § 202. Defendant concedes that plaintiff is entitled to prejudgment interest but argues that rather than running from the dates upon which the losses occurred that interest should run from either the date that plaintiff submitted the claim to defendant or from the date plaintiff first notified defendant of the losses.

Because the parties dispute only the date from which interest will run with respect to any judgment this Court enters in favor of plaintiff I will defer this issue until such time as post trial motions are resolved and I am prepared to enter judgment.

Plaintiff also asks this Court to award plaintiff interest and attorney fees and court costs pursuant to 42 Pa. C.S.A. § 8371, which provides:

> In an action arising under an insurance

> policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

At trial, I in part charged the jury as follows with respect to plaintiff's § 8371 claim:

> You have decided against CIGNA with respect to the defenses it has asserted before you. But that fact does not automatically mean that CIGNA has been guilty of bad faith.
>
> To recover for bad faith, Younis Brothers must prove (1) that CIGNA did not have a good faith basis for the decisions it made in the handling of the clams that plaintiff made under the policies and (2) either that CIGNA knew that the decisions it made in handling Younis Brothers' claims were not made in good faith or that CIGNA recklessly disregarded the fact that it lacked a good

faith basis for the decisions it made in regard to how it handled those claims.

In other words, on the first point plaintiff must prove that CIGNA did not have a good-faith basis for its decision and as to the second point, Younis Brothers must prove either intentional or reckless disregard on the part of CIGNA of the rights of Younis.

If CIGNA simply was negligent or merely exhibited bad judgment or only had a mistaken belief in handling Younis Brother's claims then CIGNA did not act in bad faith.

In addition, I instruct you that a mere delay by the insurer in investigating a claim will not support a finding of bad faith. In order to constitute bad faith, a delay must evidence a dishonest purpose on the part of the insurer and involve the breach of a known duty by the insurer — a duty of good faith and fair dealing — through some motive of self-interest or ill will on the part of the insurer. The mere fact that an investigation by the insurer is deficient or incompetent is not enough to establish intentional or reckless disregard by the insurer of the rights of the insured.

The jury returned a general verdict that defendant had acted in bad faith toward plaintiff. The jury further determined,

however, that defendant's actions were not outrageous and so the jury was not required to consider the issue of punitive damages.

Defendant now renews its argument — which I addressed briefly in my November Memorandum — that I erred in failing to require special interrogatories with respect to defendant's bad faith and that my independent review of the evidence to determine whether to award interest and attorney fees and costs under § 8371 will improperly intrude upon the factfinding function of the jury. I am, again, not persuaded by defendant's argument but will revisit it to further clarify my construction of the statute.

In my November Memorandum I concluded that § 8371 permits the imposition of two distinct types of remedies upon a determination of a defendant's bad faith. It permits a court to impose the legal remedy of punitive damages and the equitable remedies of increased interest and attorney fees and costs. With respect to punitive damages I concluded that § 8371 is not unconstitutional because Pennsylvania law provides adequate guidance for the imposition of punitive damages and for the amount of a punitive damage award. *See* November 16, 1994 Memorandum, at 6-9;*see also Coyne v. Allstate Insurance Co.*, 771 F. Supp. 673 (E.D. Pa. 1991). With respect to the equitable remedies provided in the statute I concluded that the § 8371 is not constitutionally vague because it merely permits a court — upon a finding of bad faith conduct on the part of a defendant — to exercise equitable powers that are inherent and which judges have historically exercised subject to their own sound discretion. *See* November 16, 1994 Memorandum, at 9.

The determination of bad faith required by a § 8371,

therefore, does not obligate the judge to do anything. By using the term "may" in drafting the statute, the Pennsylvania legislature provided that — with respect to interest and attorney fees and costs — the trial judge may at his or her sound discretion exercise the inherent equitable power of the court and make such awards subject to an initial determination of a defendant's bad faith. The decision to award such remedies is therefore subject to but analytically distinct from the determination of bad faith. In addition, the decision to award a particular remedy pursuant to § 8371 is analytically distinct from the decision to award or not award another remedy provided by the statute.[2] I do not consider my independent review of the evidence in making this determination to improperly intrude upon the factfinding function of the jury because the jury, in making its determinations, neither received the instruction nor possessed the power to review the evidence with respect to whether the Court should exercise its equitable power as permitted under the statute.[3]

As I presently view the totality of defendant's actions with respect to plaintiff's claim for coverage under the policies in dispute I conclude that such bad faith as defendant may have exhibited does not rise to the level that moves this Court to exercise its discretion to award either interest or attorney fees and court costs.

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2. This construction of § 8371 accords with 1 Pa.C.S.A. § 1921 which provides that "[w]hen the words of a law are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."

3. This, therefore, is a very different case from that which would have been presented had the finding of bad faith mandated that the Court award increased interest and attorney fees and court costs.

Appendix C

The parties intend to file post trial motions that will require me to undertake a detailed examination of the evidence presented at trial. I will consider whether to filed detailed factual findings with respect to this conclusion at that time.

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED NOVEMBER 16, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 91-6784

YOUNIS BROS. & CO., INC.

v.

CIGNA WORLDWIDE INSURANCE COMPANY

MEMORANDUM

O'Neill, J. November 16, 1994

I. Procedural History

On October 30, 1991, plaintiff Younis, a Liberian corporation, filed its complaint against defendant CIGNA. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

Plaintiff alleged that defendant breached a pair of fire insurance policies which defendant issued to plaintiff. Counts I through III sought compensatory damages for breach of the policies, which concerned three locations in Liberia. In Count IV, plaintiff alleged:

64. As of the commencement of this action,

> CIGNA has made no offer to Younis Bros. for any of the losses it suffered in Liberia in August of 1990.
>
> 65. CIGNA has acted in bad faith in its adjustment of Younis Bros.'s claim.
>
> 66. CIGNA has acted in bad faith in its investigation of Younis Bros.'s claim.
>
> * * *
>
> 68. Because of CIGNA's bad faith, Younis Bros. is entitled to an award of interest, counsel fees, punitive damages in accordance with Pennsylvania law, 42 Pa. C.S.A. § 8371.

In its answer, defendant denied plaintiff's allegations of bad faith and asserted affirmative defenses against plaintiff's bad faith claim.

Defendant contended that Count IV failed to state a claim "because application of the statute would be a constitutionally impermissible extraterritorial application of Pennsylvania law" violating the Commerce Clause of and due process rights guaranteed by the United States Constitution;[1] "because the statute violates guarantees of due process . . . by failing to adequately to inform those against whom it may be applied of

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1. *See* Answer, filed December 18, 1991, at ¶¶. 124, 125. On October 15, 1993, I issued a Memorandum and Order denying defendant's motion for partial summary judgment based on this defense.

the conduct or actions it prohibits and/or penalizes;"[2] because the statute allows "the imposition of punitive damages without adequate substantive and procedural guidelines and protections;"[3] and because the statute violates "rights of trial by jury afforded by the United States Constitution and Pennsylvania Constitution."[4]

Plaintiff subsequently filed an amended complaint setting forth additional factual allegations and repeating its assertion that defendant acted in bad faith in its investigation and adjustment of plaintiff's losses. In its answer, defendant denied those allegations, incorporated by reference the affirmative defenses asserted in its earlier answer.[5] During the pretrial phase, the Court consolidated this case with a related case, *The Abi Jaoudi and Azar Trading Corporation v. Cigna Worldwide Insurance Company,* Civil Action No. 91-6785.

Trial in both cases began on February 7, 1994. The Court divided the cases into phases. In phase one, the jury found that plaintiffs' suits were not barred by the war risk exclusion clauses in the various insurance policies.

In phase two, which concerned a number of affirmative

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2. *See* Answer, filed December 18, 1991, at ¶. 127.

3. *See* Answer, filed December 18, 1991, at ¶. 128.

4. *See* Answer filed December 18, 1991, at ¶. 129.

5. *See, e.g.,* Order dated January 9, 1992 (consolidating cases for discovery); Order dated August 20, 1993, Civil Action No. 91-6785 (reassigning *AJA* case to Judge O'Neill as related to *Younis Brothers* case).

defenses arising out of provisions in the insurance policies, the jury found in favor of plaintiffs on all questions except that it could not reach a decision with respect to the affirmative defense of fraud asserted against plaintiff Abi Jaoudi and Azar Trading Corporation ("AJA").

The Court therefore discontinued proceedings in the *AJA* case and resumed proceedings in the *Younis* case. Because the parties did not dispute the amount of compensatory damages claimed by Younis, the Court did not hear any evidence relevant to phase three.

With respect to phase four, the parties disputed the definition of the term "court" in section 8371. Defendant asserted that the term "court" referred only to the trial judge while plaintiff argued that the term meant "judge and jury." I did not resolve this dispute but felt constrained by the Seventh Amendment to submit to the jury the questions whether defendant acted in bad faith, whether its conduct was outrageous and whether plaintiff was entitled to an award of punitive damages. *See* Transcript, April 6, 1994, at 112-116.

The jury determined that defendant acted in bad faith towards plaintiff. This required phase five, in which the jury found that defendant's conduct was not outrageous. Accordingly, the jury was not required to consider an award of punitive damages to plaintiff.

At a post-trial hearing, I requested that the parties brief the question of whether section 8371 is constitutional. *See* Transcript, May 13, 1994, at 36-38. Comprehensive briefs were submitted and oral argument was held on August 18.

Appendix D

For the following reasons, I conclude that section 8371 is constitutional. I also conclude that in a federal court action pursuant to section 8371 a party is entitled to a jury trial with respect to a claim for punitive damages but is not entitled to a jury trial with respect to the other remedies available under the statute.

II. Discussion

A. Section 8371

In *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Company*, 431 A.2d 966 (Pa. 1981), the Pennsylvania Supreme Court held that there is no common law action for bad faith conduct by an insurer. The Court stated that there "is no evidence to suggest, and we have no reason to believe, that the system of sanctions established under the Unfair Insurance Practices Act must be supplemented by a judicially created cause of action." *Id.* at 970. The Court added that "it is for the Legislature to announce and implement the Commonwealth's public policy governing the regulation of insurance carriers" and "to determine whether sanctions beyond those created under the Act are required to deter conduct which is less than scrupulous." *Id.*

In 1990, the Pennsylvania legislature created a statutory cause of action for bad faith. That statute, which became effective on July 1, 1990, and is codified at 42 Pa. C.S.A. section 8371, provides:

> In action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

(1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.

(2) Award punitive damages against the insurer.

(3) Assess court costs and attorney fees against the insurer.

There is no legislative history that specifically concerns the passage of this statute, which was enacted as part of a comprehensive insurance bill.

B. Defendant's Objection that Section 8371 Violates the Due Process Clause of the Fourteenth Amendment

Defendant asserts that section 8371 allows for arbitrary and unreviewable decision making and requests that the Court declare it unconstitutional in violation of the due process clause of the Fourteenth Amendment.[6] I am unable to agree.

Essentially, defendant contends that section 8371 violates the Fourteenth Amendment because it permits punitive damages and "non-punitive damages" (interest, costs and attorney fees) to be imposed by the court at its discretion upon a finding of bad faith without specifying a standard for a court to

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6. Plantiff asserts that defendant either waived this argument or is barred from asserting it under the doctrine of judicial estoppel. I disagree. Defendant set forth itsconstitutional objections in its answer to the complaint and never took a position contrary to them during the litigation.

employ when deciding whether those remedies are appropriate. While disputing the correctness of the cases which uphold the validity of section 8371, defendant asserts that those cases are limited to the distinct issues of "the statutes lack of definition of 'bad faith' " and "the arbitrariness inherent in fixing the *amount* of puntitive damages" and do not address defendant's additional Fourteenth Amendment objection. Defendant's Memorandum at 8 (emphasis original) (citing *Empire Fire & Marine Ins. Co. v. Nationwide Mut. Ins. Co.*, No. 93-0325, 1993 U.S. Dist. LEXIS 8989 (E.D. Pa. June 15, 1993); *Santoro v. Allstate Ins. Co.*, No. 91-3304, 1991 U.S. Dist. LEXIS 13591 (E.D. Pa. Sept. 25, 1991); *W.W. Management & Dev. Co. Inc. v. Scottsdale Ins. Co.*, 769 F. Supp. 178 (E.D. Pa. 1991); *Seeger v. Allstate Ins. Co.*, 776 F. Supp. 986 (M.D. Pa. 1991); *Coyne v. Allstate Insurance Company*, 771 F. Supp. 673 (E.D. Pa. 1991)).

As an initial matter, I agree with the reasoning and result reached by Judge Ludwig in *Coyne*, where the Court rejected an insurance company's arguments that section 8371 was unconstitutionally vague because it did not define the term "bad faith" and that the statute violated due process by failing to establish standards governing the award of punitive damages.[7]

With respect to the assertion that section 8371 inadequately defines the term "bad faith," the *Coyne* Court concluded that in the insurance context the term has acquired a peculiar and universally acknowledged meaning: "any frivolous or unfounded refusal to pay proceeds of a policy. . . . For purposes of an action against an insurer for failure to pay a

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7. *Coyne* has been cited with approval by the Court of Appeals for the Third Circuit. *See, e.g., Polselli v. Nationwide Mut. Fire Ins. Co.*, 23 F.3d 747, 751 (3d Cir. 1994); *Colantuno v. Aetna Ins. Co.*, 980 F.2d 908, 910-911 (3d Cir. 1992).

claim, such conduct imports dishonest purpose and means a breach of a known duty . . . through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith." *Id.* at 677-78, citing Black's Law Dictionary 139 (6th ed. 1990) and Appleman & Appleman, *Insurance Law and Practice* § 1612 (1967 and Supp. 1990). Judge Ludwig therefore concluded that despite the absence of a statutory definition of "bad faith" in section 8371 the phrase is sufficiently defined in the insurance context to provide constitutionally adequate standards to guide the conduct of the legal community and the insurance industry.[8] *Id.* at 678.

With respect to defendant's claim that section 8371 fails to provide standards that guide and limit the amount of punitive damages which may be awarded pursuant to the statute, the *Coyne* Court held that Pennsylvania law — which follows Restatement (Second) of Torts Section 908(2) — guides and limits such awards consistent with due process requirements. *Id.* at 679. Judge Ludwig therefore concluded that although "§ 8371 confers on the trial court significant discretion in its determination of punitive damages . . . that discretion is not unlimited. As long it is exercised within the reasonable constraints required by Pennsylvania law, due process is satisfied." *Id.* at 680.[9]

I am guided by the reasoning of *Coyne* in resolving

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8. The *Coyne* opinion guided my charge to the jury in phase four.

9. In my charge to the jury in phase five, I was guided by the standards articulated in *Coyne* and in recent Supreme Court cases concerning punitive damages. *See, e.g., TXO Prod. Corp. v. Alliance Resources Corp,* 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip,* 449 U.S. 1 (1992).

defendant's additional "first impression" challenge to section 8371 — that "[t]he legislature's failure to provide standards to guide the imposition of damages under § 8371 and its impermissible delegation of that substantial public policy decision to individual courts on an ad hoc basis renders § 8371 unconstitutionally vague and facially violative of Due Process guarantees." Defendant's Memorandum, at 8. As Pennsylvania law adequately guides and constrains the amount of punitive damages awarded under section 8371, it equally provides a standarized context for "the imposition" of those damages. *See* Restatement (Second) of Torts §§ 908, 909.[10]

With respect to the imposition of interest, court costs and attorney fees, I conclude that the requirement that a court find bad faith prior to making such an award provides an adequate standard to guide the legal communit and the insurance industry. In addition, I note that courts historically have retained wide discretion to fashion equitable remedies in situations in which legal remedies are insufficient. Therefore, I cannot agree with defendant's argument that section 8371 impermissibly delegates public policy to "individual courts on an ad hoc basis."[11]

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10. I note that in this case the jury was charged, in accordance with section 908 of the Restatement, that despite a finding of bad faith, punitive damages should only be awarded if the jury determined that defendant's bad faith constituted outrageous conduct. The jury determined that defendant's actions were not outrageous and, accordingly, was not required to consider a punitive award.

11. None of the cases cited by defendant in its memorandum persuades me that this conclusion is incorrect. Only *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), requires comment. In *Giaccio*, the Supreme Court struck down as "void for vagueness" a Pennsylvania statute allowing costs to be awarded by a jury against a defendant acquitted of a misdemeanor if it found that

(Cont'd)

Appendix D

C. The Application of the Seventh Amendment to Section 8371 Claims Brought in Federal Court

The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The Seventh Amendment is inapplicable to state trials. *See Melancon v. McKeithen*, 345 F. Supp. 1025, 1027 (holding that jury trial in civil cases is not "so fundamental to the American system of justice as to be required of state courts by due process."), *aff'd sub nom. Davis v. Edwards*, 409 U.S. 1098 (1973) (per curiam); *Colgrove v. Battin*, 413 U.S. 149, 169 n. 4 (1973) (Marshall, J., dissenting) (collecting cases).

In a diversity case, whether a party has a right to a jury trial is a matter of federal law. *Simler v. Conner*, 372 U.S. 221, 222 (1963) ("the right to a jury trial in the federal courts is to be determined as a matter of federal law. . . . The federal policy favoring jury trials is of historic and continuing strength."). The Seventh Amendment applies to both statutory and common law proceedings when the proceedings concern "legal" as opposed to "equitable" claims. *Curtis v. Loether*, 415 U.S. 189, 194 (1974) ("The Seventh Amendment does apply to actions

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(Cont'd)
defendant guilty of "some misconduct." *Id.* at 404. The Supreme Court concluded that "[i]t would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct.' " *Id.* In the insurance context, however, the meaning of the term bad faith is sufficiently defined to both guide a party's conduct and to permit a party to prepare a defense against a bad faith charge. *See, e.g., Polselli*, 23 F.3d at 751.

enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.").

When determining whether a statutory right also includes a right to a jury trial, the inquiry focuses first on the statute and then on the nature of the action and the relief sought. As the Court of Appeals explained in *Cox v. Keystone Carbon Co.*, involving a plaintiff's right to a jury trial under a pair of ERISA provisions:

> [T]his court must first examine the language and legislative history of ERISA to determine if Congress intended to create a right to a jury trial. If the statutory analysis does not reveal a congressional intent to provide a jury trial, the seventh amendment to the United States Constitution must be examined to determine if it commands that a jury trial be provided.

Cox v. Keystone Carbon Co., 861 F.2d 390, 393 (3d Cir. 1988) (citations omitted). Although *Cox* concerned a party's right to a jury trial under a federal statute, courts in this district have employed the *Cox* analysis when determining whether a party has a right to a jury trial when asserting a claim under a Pennsylvania statute. *See, e.g., Welcker v. Smithkline Beckman*, 746 F. Supp. 576, 581-582 (E.D. Pa. 1990) (evaluating demand for jury trial under the Pennsylvania Human Relations Act, 43 Pa.C.S.A. § 951 et seq.).

Appendix D

1. The Meaning of the Term "Court" in Section 8371

Section 8371 does not explicitly provide for a jury trial. Plaintiff, however, asserts that I should construe the term "court" in section 8371 to mean "judge and jury."[12] Defendant contends that the term means only "judge."

Defendant argues for its interpretation on the basis that "court" is defined in 42 Pa.C.S.A. § 102, as "any one or more of the judges of the court who are authorized by general rule or rule of court, or by law or usage, to exercise the powers of the court in the name of the court." Section 102 does not refer to the jury in its definition of "court". Further, other courts in this district have concluded that the "plain language of the statute" shows "that the Pennsylvania legislators intended § 8371 actions to be heard and decided by the" judge and not the jury. *See Thomson v. Prudential Property and Casualty Ins. Co.*, No. 91-4073, 1992 U.S. Dist. LEXIS 12627 at *8 (E.D. Pa. Aug. 24, 1992).

Defendant also points to the legislative history of the insurance reform bill of which section 8371 was a part. In discussion regarding that bill, State Senator Scanlon specifically distinguishes between a decision made by the "court" as opposed to the "jury." *See* Statement of Senator Scanlon, Senate Journal, December 11, 1989, at 1453.[13] Even

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12. I note that were I to adopt plaintiff's argument, I would in fact have to conclude that section 8371 does not reserve to the judge any role under the statute as it fails to specifically define the role of the judge as distinguished from that of the jury. It seems to me that plaintiff's interpretation amounts to construing the term court to refer only to a jury; and, in fact, I understand plaintiff to contend that where a jury trial is requested all decisions with respect to relief are to be made by the jury.

13. Senator Scanlon explained, "one of the changes in this current amendment is that the decision as to whether or not the plaintiff has exceeded (Cont'd)

though this remark does not specifically concern section 8371, defendant argues that it suggests that the legislature did not generally equate the term "court" with "jury" in regard to the insurance reform bill which enacted section 8371.

The Pennsylvania legislature has enacted several statutes where the functions of the "jury" and "court" (meaning judge) are specifically distinguished. *See, e.g.*, 50 Pa.C.S.A. § 944[14] and 42 Pa.C.S.A. § 5327(c).[15] The language of these statutes leads me to conclude that the term "court" does not include "jury" and that the legislature specifically includes the term "jury" in a statute when it wants the jury to serve as a decision maker under the statute. I agree with defendant that the term "court" in section 8371 refers only to the judge and not to the judge and the jury and therefore conclude that section 8371 does not create a right to a jury trial.

(Cont'd)
the verbal threshold is a matter of law rather than a question for a jury. In short, if a suit is filed and testimony is adduced setting forth the injuries, the court will decide whether or not the threshold has been met rather than leaving it up to the figuring of a jury." *See* Senate Journal, December 11, 1989, at 1453.

14. Section 944, which concerns guardianship proceedings, provides: "If the person against whom the proceedings are taken shall demand in writing, prior to the decision of the court on such application, a trial by jury, it shall thereupon be the duty of the said court to award an issue, framed to determine the question of fact involved, and such trial shall be granted."

15. Section 5327(c), which concerns determination of foreign law, provides that the "court, not jury, shall determine the law of any governmental unit outside this Commonwealth. The determination of the tribunal is subject to review on appeal as a ruling on a question of law."

Appendix D

2. The Seventh Amendment's Mandate

Having concluded that the Pennsylvania legislature did not intend to provide parties with a right to a jury trial for section 8371 claims, I turn to the question of whether the Seventh Amendment nonetheless mandates that a party may present a section 8371 claim to a jury when that claim is brought in federal court. *See Cox*, 861 F.2d at 393. To determine whether section 8371 embodies a "legal" as opposed to "equitable" claim, I first "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity" and then examine the remedy sought under the statute. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990).[16] The nature of the remedy sought is the more important prong of the analysis. *Id.* at 565; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

Neither party compared an action against an insurer under section 8371 with actions brought in England prior to merger. However, I note that section 8371 is a statutory cause of action arising out of a bad faith breach of an insurance contract. Prior to merger, an action for breach of contract normally constituted a legal claim. I note, however, that section 8371 provides

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16. In *Ross v. Bernhard*, 396 U.S. 531 (1970), the Court held if a stockholders' derivative suit under Fed.R.Civ.P. Rule 23.1 against a third person presented legal claims the stockholders were entitled to a jury trial. The Court explained that "the 'legal nature' of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries." *Id.* at 538 n. 10. Subsequently the Court narrowed the inquiry to the first two factors. *See, e.g., Tull v. United States*, 481 U.S. 412, 417-418 (1987) (mentioning only pre-merger custom and remedy sought).

remedies not normally available at law. I therefore conclude that with respect to a section 8371 claim brought in federal court the applicability of the Seventh Amendment should be delimited by the nature of the remedy sought under the statute.

The Supreme Court has explained that "[r]emedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Tull*, 481 U.S. at 422. Accordingly, in *Thomson*, Judge Joyner held that the Seventh Amendment permitted a plaintiff seeking punitive damages pursuant to section 8371 to present that claim to a jury. *See Thomson*, No. 91-4073, 1992 U.S. Dist. LEXIS 12627 at *10 (E.D. Pa. Aug. 24, 1992). This holding apparently was not appealed. I believe that the Court in *Thomson* arrived at the right result with respect to punitive damages under section 8371.

The Court in *Thompson*, however, did not address the issue of whether the Seventh Amendment requires that a party be permitted a jury trial with respect to a claim for interest or court costs and attorney fees available under section 8371. I note the Seventh Amendment does not grant a party the right to submit equitable claims to a jury merely because legal claims also are present. *See Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242, 1245 (3d Cir. 1994) (no jury right attaches to equitable claims), *petition for cert. filed* (Aug. 19, 1994); *see, e.g., Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 508 (1959) (instructing that a district court should permit a jury to resolve legal claims presented in an action prior to the court ruling on the equitable claims); *but cf., Fitzgerald v. United States*, 374 U.S. 16 (1963) (holding — in the context of admiralty law — that when a suit would become unnecessarily complicated if

part is tried by a jury and part by a judge "[o]nly one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments").[17]

In its brief, plaintiff concedes — and I concur — that an award of prejudgment interest is an equitable remedy not implicated by the Seventh Amendment. *See* Defendant's Memorandum at 41; *Laird v. Hudson Engineering Corp.*, 449 F.2d 216, 217 (5th Cir. 1971), *cert. denied, United States Steel Corp. v. Laird*, 405 U.S. 955 (1972). Similarly, because "there is no common law right to recover attorney fees, the Seventh Amendment does not guarantee a trial by jury to determine the amount of reasonable attorneys fees." *Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 279 (5th Cir. 1991); *see also Swofford v. B & W Inc.*, 336 F.2d 406, 413 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965) ("exemplary damages [under patent act] and attorneys' fees are not money claims triable by jury, although they are awarded in a legal action."); *Empire State Ins. Co. v. Chafetz*, 302 F.2d 828, 830 (5th Cir. 1962) (noting that "[t]here was no common law right to attorney's fees."); *A.G. Becker-Kipnis & Co. v. Letterman Commodities, Inc.*, 553 F.

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17. Because I do not believe that my decision to divide the determination of remedies under section 8371 between the court and the jury necessarily complicates this case, I decline to consider the applicability of *Fitzgerald* to the present matter. *See* 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2302 (1971) (it is not clear that the Court meant *Fitzgerald* to be applied outside of the admiralty context). Further, because I conclude, *infra*, that my determination of the issue of court costs and legal fees and interest will not require me to revisit a fact determined by the jury, I conclude that the Seventh Amendment does not preclude me from reserving the power to rule on the traditionally equitable remedies available pursuant to section 8371.

Supp. 118, 122-124 (N.D. Ill. 1982) (discussing right to jury trial and attorneys' fees, concluding that court rather than jury makes determination).[18]

I therefore conclude that when a federal court action pursuant to section 8371 seeks punitive damages a party is entitled to a jury trial on that issue and on the issue of bad faith. The Seventh Amendment does not, however, command a court to honor a party's request for a jury trial with respect to a claim for interest, court costs or an attorney fees pursuant to the statute. However, because plaintiff is entitled to a jury trial on

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18. Plaintiff cites *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306 (2d Cir. 1993), to support its assertion that the Court "should have allowed the jury to determine whether the Plaintiff was entitled to recover interest, attorney's fees and costs." *See* Plaintiff's Memorandum at 45. *McGuire*, however, involved a claim for attorneys' fees based on a contract providing for the award of such fees and is not applicable to the present controversy where plaintiff's claim for attorney fees is based on section 8371 rather than a contract between the parties. *McGuire*, 1 F.3d at 1314; *see also Empire State Ins. Co.*, 302 F.2d at 830 (refusing to allow jury to decide whether attorneys' fees should be awarded on claim based on state statute governing actions based on insurance policies).

Plaintiff also cites *Davis v. Naviera Aznar S.A.*, 37 F.R.D. 223 (D.Md. 1965), to support its contention that this Court should have allowed the jury to decide whether plaintiff was entitled to interest, cost and attorney fees under section 8371. In *Davis*, which involved a suit by a longshoreman against a ship owner, the district court held that "where a general demand for a jury trial has been made, evidence of counsel fees and costs of litigation must be submitted to the jury, under proper instructions, for the determination of the jury in arriving at the total damages to be assessed against a third-party defendant." *Davis*, 37 F.R.D. at 225. In my view, *Davis* is not persuasive because it is inconsistent with the authority I discussed earlier. *Davis* has never been cited by a federal court.

its claim for punitive damages under section 8371, I am bound by the jury's finding that defendant acted in bad faith towards plaintiff in determining the appropriateness of the equitable remedies that plaintiff seeks under the statute.[19] *Cf. Roebuck v. Drexel University,* 852 F.2d 715, 737-738 (3d Cir. 1988) (district court tried claims under 42 U.S.C. § 1981 and Title VII; the Court of Appeals held that "because the elements of proof are identical . . . a trial court is bound in a Title VII case to conform its verdict to the findings of the jury in a concurrently tried § 1981 case.").

D. Section 8371 does not Violate the Seventh Amendment.

Because I have concluded that the Seventh Amendment requires that a party is entitled to present a claim for punitive damages brought in federal court pursuant to section 8371 to a jury, defendant argues that I must find the statute unconstitutional. Defendant argues that the Pennsylvania legislature's selection of the "court" as the decisionmaker under section 8371 is a substantive provision of the statute for the purpose of the *Erie* doctrine and must therefore be applied in federal court in violation of the Seventh Amendment. *See Erie v. Tompkins,* 304 U.S. 64 (1938). Defendant argues that a determination on my part that the designation of the decisionmaker is merely a procedural provision for the purpose

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19. Both parties contend that the Court's procedure — having the jury determine bad faith and whether to award punitive damages but reserving for itself the decision whether to award interest, costs and attorney fees under the statute — will require the Court to re-examine the factual decisions made by the jury in this case in violation of the Seventh Amendment. I am not persuaded by either party's arguments on this point.

of *Erie* would contravene the intent of the Pennsylvania legislature which I may not do under *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958). *See* Defendant's Memorandum at 22-26. I am unable to adopt defendant's reasoning.

The Supreme Court has cautioned that a court is to avoid mechanistic determinations with respect to which provisions of a state statute are procedural and which are substantive. *See Hanna v. Plumer*, 380 U.S. 460, 466-67 (1965) (choices between state and federal law are to be made by reference to the policies underling the *Erie* rule). One of the important considerations in determining whether a provision of a state law is substantive or procedural is whether the provision can fairly be construed as outcome determinative. *See Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945); *Neifeld v. Steinberg*, 438 F.2d 423, 426 (3d Cir. 1971) (the outcome determinative analysis, in light of *Hanna*, must be read with reference to the aims of preventing forum-shopping and avoidance of inequitable administration of the laws) *see also* Defendant's Memorandum at 28 (arguing that the selection of the judge rather than the jury as the decisionmaker pursuant to section 8371 is to protect insurance companies from extreme punitive damage awards that it claims juries are likely to level against insurance companies).

I conclude — as did the Supreme court in *Byrd* — that there is not a strong possibility that a judge and a properly instructed jury would make substantially different punitive damage determinations under section 8371. *See United States v. Gilsenan*, 949 F.2d 90, 96 (3d Cir. 1991) (a jury may be presumed to follow the court's instructions in arriving at a verdict), *cert. denied* 112 S. Ct. 2971. In either case Pennsylvania law binds the decisionmaker. In addition, as the

Supreme Court noted in *Byrd*, the judge in the federal system has discretion pursuant to Fed.R.Civ.P. Rule 50 to "to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence. We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of dispute factual issues to yield to the state rule in the interest of uniformity of outcome." 356 U.S. at 540.

My determination that the Pennsylvania legislature's selection of the court as the decisionmaker is not "an integral part of the special relationship created by the statute" *Byrd*, 356 U.S. at 536, and may therefore be regarded as procedural for the purpose of *Erie* without contravening the Pennsylvania legislature's intent is buttressed by Pennsylvania rules of statutory construction. Title 46 P.S. § 551 provides that "[t]he object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Title 46 P.S. § 552(3) provides that in determining the intent of the legislature a court may presume "[t]hat the Legislature does not intend to violate the Constitution of the United States or of this Commonwealth." I am required to choose between two distinct interpretations of the legislative intent behind section 8371, one of which would require me to hold the statute — at least in part — unconstitutional and one of which would not. I conclude that the Pennsylvania legislature intended to provide for the court as decisionmaker under section 8371 consistent with the established requirements of the Seventh Amendment and hold that that provision is procedural for the purpose of *Erie*. Therefore, my determination that a party is entitled to a jury trial with respect to a section 8371 claim seeking punitive damages does not contravene the intent of the Pennsylvania legislature.

Appendix D

E. Interest and Court Costs and Attorney Fees

In drafting section 8371, the Pennsylvania legislature adopted language that permits but does not compel the court to award punitive damages, prejudgment interest and to assess court costs and attorney fees against an insurer upon a determination that the insurer acted in bad faith toward the insured. Therefore, the jury's finding of bad faith permits a court to exercise its equitable power to order prejudgment interest and/or court costs and attorney fees.[20] At this juncture, however, I do not read section 8371 to mandate such remedies.

Accordingly, the parties will agree upon a briefing schedule to address the issues of whether plaintiff is entitled to interest and attorney fees and court costs as provided by section 8371. If appropriate, the parties also should agree on a schedule for all other motions filed or to be filed.

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20. In stating that the jury's findings of bad faith permits me to award interest and court costs and attorney fees, I do not state a position with respect to whether that finding is supported by the weight of the evidence.

APPENDIX E — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED OCTOBER 15, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 91-6785

THE ABI JAOUDI AND AZAR TRADING CORPORATION

v.

CIGNA WORLDWIDE INS. CO.

CIVIL ACTION

NO. 91-6784

YOUNIS BROTHERS & COMPANY

v.

CIGNA WORLDWIDE INS. CO.

MEMORANDUM AND OPINION

O'Neill, J. October 15, 1993

Currently before the Court are motions by plaintiffs and defendant which raise the question whether Pennsylvania or Liberian law governs the issue of punitive damages in these cases.

Plaintiffs are corporations organized under the laws of Liberia with their principal places of operation is Monrovia.

Appendix E

Defendant Cigna Worldwide Insurance Co. is a corporation organized under the laws of Delaware. It conducts substantial business, and its activity relevant to the claims for punitive damages occurred, in Pennsylvania.[1]

Plaintiffs allege that defendant wrongfully has declined coverage under insurance policies covering property at a number of locations in Liberia. Among other things, plaintiffs seek punitive damages "in accordance with Pennsylvania law, 42 Pa. C.S.A. § 8371."[2] *See* Plaintiff's Complaint, Civil Action

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1. In is motions, defendant asserts that its principal place of business is Delaware. However, its only supporting evidence is a page of deposition testimony by Ilana G. Hessing, a Cigna employee, who states merely that Cigna Worldwide Insurance Company is incorporated in Delaware. *See* Deposition of Ilana G. Hessing, February 14, 1992, at 5. Even if defendant's principal place of business is Delaware, plaintiff shows that many of the officials who made decisions relevant to this action have offices in Pennsylvania. *See, e.g., id.* at Exhibit 1 p.3 ("Nature of work performed at Two Liberty Place, Philadelphia, relates to financial statements of the Company's overseas Property and Casualty Insurance operations."). *See also* Deposition of Elie Abdelnour, submitted as Plaintiffs' Exhibit L, at 28-29 (identifying supervisor as Mr. Psaki, who has an office in Philadelphia).

2. 42 Pa. C.S.A. § 8371 provides: "In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer."

No. 91-6784, submitted as Plaintiff's Exhibit B, at ¶.68; *See* Plaintiff's Third Amended Complaint, Civil Action No. 91-6785, dated September 23, 1992, at ¶.132.[3]

In its summary judgment motions, defendant offers two reasons for dismissing plaintiffs' claims for punitive damages. First, noting that the contracts were signed in Liberia and insured property there, defendant contends that applying Pennsylvania law to this case "would constitute an unconstitutional extraterritorial application of a state's law." *See, e.g.*, Defendant's Motion for Partial Summary Judgment as to Plaintiff's Claims for Punitive Damages, filed September 9, 1993, at ¶.32. Second, defendant asserts that this case is governed by Liberian law, which does not provide for punitive damages.

The parties agree that the legal issue before the Court is a choice of law question and that either the law of Pennsylvania or Liberia applies. Defendant and plaintiffs disagree as to whether Liberian law provides for punitive damages. Because I conclude that Pennsylvania law applies, I do not decide this latter issue.

As subject matter jurisdiction is based on diversity of citizenship, I apply the conflict of laws rules of Pennsylvania. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Pennsylvania's conflicts law combines both grouping of

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3. *See also* Plaintiff's Third Amended Complaint, Civil Action No. 91-6785, dated September 23, 1992, at ¶.158 (requesting punitive damages without specifying legal authority justifying their award); Plaintiff's Amended Complaint, Civil Action No. 91-6784, dated February 5, 1992, at ¶.157 (same).

contacts and interest analysis. *See General Star National Insurance Co. v. Liberty Mutual Insurance Co.*, 960 F.2d 377, 379 (3d Cir. 1992), citing *Melville v. American Home Assur. Co.*, 584 F.2d 1306 (3d Cir. 1978). Under Pennsylvania's "flexible conflicts methodology, . . . the place having the most interest in the problem and which is the most intimately concerned with the outcome is the forum whose law should be applied." *In re Complaint of Bankers Trust Co.*, 752 F.2d 874, 881-82 (3d Cir. 1984).

My evaluation of these factors leads me to conclude that Pennsylvania law governs plaintiffs' punitive damages claims. Under section 8371, the jury determines whether defendant acted in "bad faith" in its decision to deny coverage. This inquiry focuses on the conduct of defendant and its agents, which occurred in Pennsylvania. Indeed, as plaintiffs demonstrate, the official responsible for deciding whether to deny coverage was Michael Psaki, who worked in Philadelphia.[4] Pennsylvania is thus the forum "most intimately concerned" with plaintiffs' claims for punitive damages. *See, e.g., Thomson v. Prudential Property and Casualty Insurance Co.*, 1992 U.S. Dist. LEXIS 1980 at *9-10 (E.D. Pa. 1992) (applying Pennsylvania law to adjudicate Pennsylvania resident's claim under § 8371 against New Jersey insurance company; "Prudential handled plaintiff's claims out of its Horsham, Pennsylvania office.").

Similarly, I conclude that Pennsylvania has a greater

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4. During the period relevant to this dispute, Mr. Psaki was employed by the Insurance Company of North America, a Cigna company, but had responsibility for defendant's actions on the claims giving rise to this lawsuit. *See generally* Deposition of Michael Psaki, attached as Plaintiffs' Exhibit O. As noted earlier, Mr. Psaki's office is in Philadelphia.

interest than Liberia in applying its law to the punitive damages question. Punitive damages under section 8371 are intended to prevent insurance companies from acting in bad faith. Accordingly, Pennsylvania has the most interest in regulating the conduct of a company which occurred within its borders. I reject defendant's constitutional argument that applying section 8371 would result in the application of Pennsylvania law to an out-of-state corporation that engaged in conduct outside of the state. Accordingly, I will deny defendant's motions and grant plaintiffs' motion.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 91-6785

THE ABI JAOUDI AND AZAR TRADING CORPORATION

v.

CIGNA WORLDWIDE INS. CO.

CIVIL ACTION

NO. 91-6784

YOUNIS BROTHERS & COMPANY

v.

CIGNA WORLDWIDE INS. CO.

ORDER

AND NOW, this 5 day of October, 1993, upon consideration of defendant's motions for partial summary judgment on claims of punitive damages, plaintiffs' motion in limine as to choice of laws issues and the accompanying memoranda, it is hereby ORDERED that defendant's motions are DENIED and plaintiffs' motion is GRANTED to the extent provided herein.

s/ Thomas N. O'Neill
THOMAS N. O' NEILL, JR., J.

APPENDIX F— DECISION OF THE SUPREME COURT OF LIBERIA IN *MANO INSURANCE COMPANY V. PICASSO CAFETERIA AND SPANISH GALLERY* DATED JULY 28, 1995

IN THE HONORABLE SUPREME COURT OF THE REPUBLIC OF LIBERIA
MARCH TERM, A.D. 1995

PRESENT:	HIS HONOR:	James G. Bull, Chief Justice
"	" "	E. Winfred Smallwood, Associate Justice
"	" "	Victor D. Hne, Associate Justice
"	" "	Boimah K. Morris, Associate Justice
"	" "	Frank W. Smith, Associate Justice

Mano Insurance Corporation, by and thru its authorized representative

RESPONDENT/APPELLANT

Versus

Picasso Cafeteria and Spanish Gallery, by and thru their General Manager, Madam Manuela Padilla Vargus,

PETITIONER/APPELLEE

BILL IN EQUITY FOR DISCOVERY AND EQUITABLE RELIEF

HEARD: March 27, 1995 DECIDED: July 28, 1995

Appendix F

JUDGMENT REVERSED

MR. JUSTICE HNE DELIVERED THE OPINION OF THE COURT.

We glean from the records in this case that the Appellee filed an action against the Appellant in a Bill in Equity for Discovery and Equitable Relief. The subject of the action was insurance contracts purchased from the Appellant by the Appellee. The Appellee was claiming under four (4) insurance contracts for losses sustained by it in 1990. The records show two policies in the name of Spanish Gallery, each in an amount of $300,000.00 totalling $600,000.00; and two in the name of Picasso Spanish Cafeteria for US $144,000.00 and US $30,000.00 respectfully totalling $174,000.00. The total claim in the Appellee's petition to the Civil Law Court was the aggregate of the four (4) policies, that is, $774,000.00.

The Appellant in its returns in the court below state that two of the policies, that is, the ones issued to Spanish Gallery for US $300,000.00 each were cancelled on December 1, 1989, or alternatively would have expired on May 18, 1990 before the civil war reached Monrovia. Appellant also claimed for majeure or impossibility of performance during the civil war.

The trial Judge rules the case to trial. At the conclusion of the trial, the jury awarded the Appellee USS $774,000.00 special damages and US $250,000.00 general damages. A judgment was entered confirming the verdict.

The Appellant has come to this Court for appellate review after complying with the appellate jurisdiction steps.

It should be noted here from the onset that the records show

that Spanish Gallery and Picasso Cafeteria are two separate and distinct businesses which were run by the Petitioner/Appellee; one as a boutique (the gallery) and the other as a cafeteria.

The insurance contracts themselves were never produced. What the records consist of as insurance contracts are cover notes invoices and endorsements.

A reading of the endorsements which were taken as the insurance contracts for Spanish Gallery state: It is hereby agreed and understood that the insurance by this policy is renewed with effect of 20th day of May 1989 to the 19th day of May, 1990. The second endorsement in the name of Spanish Gallery contains the same statement showing the validity period as May 19, 1989 to May 18, 1990. The face value of the policy in each instance is US $300,000.00. The Appellant says however that these policies were cancelled on December 1, 1989 with return premium of $1,050.00 and $633.35, totalling $1,683.35 paid to the Appellee.

The Appellant paid this amount by check dated lst. February 1990 to the Appellee which it introduced into evidence. The check bears the endorsement of the General Manager of the Appellee encashing the check. The Appellee alleges though that this payment was to cover a claim of belts which got damaged in a consignment of goods which it received.

There is however an insurance survey report by Lloyd's covering a consignment of goods received by Spanish Gallery on 19th July, 1987. The report indicates a damage of a wet carton. The report has no specification of the goods which were damaged in the wet carton.

Appendix F

The policies as to Picasso Spanish Cafeteria are two cover notes which state the period of the insurance as 1/12/89-3-/11/90 in both cases. One is for $144,000.00 and the other for $30,000.00, totalling $174,000.00. To support these policies, two receipts issued by the Appellant to Picasso Spanish Cafeteria for $1,920.00 each was put in evidence by the Appellee.

The issues which we are to decide are:

(1) Whether the appellee brought the right form of action.

(2) Whether there was a valid insurance contract between the parties.

(3) Whether the performance under the contract was excused by the civil war.

(4) Whether the jury's verdict was supported by the evidence in the case.

The appellant avers that while our civil code has abolished all form of action and there is no longer any distinction in suits at law and suits in equity, the substantive remedies at law and in equity are still distinguished. It says that the present action is in equity which sought to enforce rights which are in contract and so should be done at law instead of through an equitable remedy. Appellant says further that the Appellee has sought a common law writ by instituting an action by Bill in Equity for Discovery and Equitable Relief; that the Court lacks jurisdiction over this form of action and should therefore be dismissed.

Our civil code provides that there is one form of civil

action. The distinction between actions at law and suits in equity, and the forms of those actions and suits heretofore existing, are abolished. *1LCLR, Title l, section 1.33 page 24.*

Our civil code also provides that if a court has obtained jurisdiction over the parties, an application for relief shall not be dismissed because not brought as an action or special proceeding or motion, whichever may be proper, but the court shall make whatever order is required for its proper prosecution. *1LCLR Title 1, Section 1.2 page 23.*

Given these provision of the Code, the contention of the appellant that the action should be dismissed cannot upheld.

As to the contention that the rights which the action seeks to secure is an equitable one while at the same time the appellant is enforcing rights growing out of contract, it is our view that decidedly discovery proceedings are grounded in equity. However, we find in our case law that a court of equity upon obtaining jurisdiction of an action will retain it and can administer full relief, both legal and equitable, so far as it pertains to the same transaction or the same subject matter, including a matter of dispute over which courts of law and courts of equity have concurrent jurisdiction. *Benson vs. Johnson 23 LLR 290 sly. 15 text at 299 (1974).* The assumption of jurisdiction by the lower court and the granting of the relief sought in equity and at law are therefore supported by law. Consequently, the contention of the appellant in this respect is untenable.

The Appellant contends that the policies under which the Appellee claims had expired or cancelled. The records show that the two policies as to Spanish Gallery were the subject of

cancellation credit notes and for which return premiums were paid in the amount of $1,683.35 by Tradevco check dated 1st February 1990, which the Appellee encashed. Further, the policies carry expiration dates of May 18, 1990 and May 19, 1990 respectively. The records contain credit notes for $1,050.00 and $633.35 respectfully dated January 29, 1990 each.

According to the trial records, when the petitioner/ appellant's first witness, Madam Manuela Padilla was asked whether policy No. 5/BB/8800010 for the Spanish Gallery was cancelled and credit note issued in her favor dated 29, January, 1990, she answered that she could not remember. When asked further whether a check dated February 1, 1990 issued to Spanish Gallery represented final payment and a cancellation of the policy of Spanish Gallery and if she still maintained that the policy of Spanish Gallery was still in force, she answered that the check was in payment of a claim she made for damaged belts contained in a consignment of goods which she brought to Liberia in November, 1987. *(Minutes of 34th Day's Jury Session, Friday, May 6, 1994. Sheets two and three).*

The trial records also show that the respondent/appellant's sixth witness, Alfred B. Sirleaf, an employee of the respondent/ appellant, testified that he was instructed by his boss to issue a return premium to Spanish Gallery for fire and burglary; and he issued a check which he turned over to his boss and turned over to Spanish Gallery. That the check number 796217 for $1,683.35 was based on voucher 4174. *(Minutes of 56th Day's Jury Session, Thursday, June 9, 1994. Sheets two and four).*

There is further evidence tending to show that the petitioner/appellee wanted to cancel the Gallery Policy because

she wanted to start a cafeteria where she has the gallery. *(Minutes of the 54th Day's Jury Session. Tuesday, June 7, 1994. Sheet 1).*

The records support the contention of the Appellant that the Spanish Gallery policies were cancelled. All the contentions advanced by the appellee that the Gallery policies were valid and enforceable must therefore crumble.

In a letter dated February 4, 1992 the Appellee thought its General Manager wrote the Appellant informing the Appellant that an unknown person or persons burst into the cafeteria and burglarized it on June 25, 1990 and got away with properties and items insured under its insurance policy. The letter reads as follows:

The Acting General Manager
MANO Insurance Corporation
Front Street, Monrovia
Liberia

February 4, 1992

Dear Sir:

Re: *Claiming losses from Burglary, Looting and Vandalism*

I wish to bring to your attention losses I suffered under my policy in 1990.

On June 25, 1990, unknown persons burst into the cafeteria and burglarized and got away with properties and items under my insurance policies.

Appendix F

In the cafeteria, unknown person also got away with cash in safe which amount to US $7,120.00 and LID $7,550.00.

Due to the complexity of the matter, I have resulted to appointing the Independent Broker Corporation to oversee my interest and to submit a comprehensive loss adjuster's report that will be unbias and exceptable to both parties.

Because I did not receive my policies before the loss, policies numbers of businesses in question is not mentioned, however, cover note numbers are as follow:

1. Picasso (Spanish Cafeteria)

   A. FP00038

   B. BUR00007

2. Spanish Gallery

   A. 5/FF/8700019

   B. 5/BB/800010

I/We look forward to your usual kind cooperation.

Sincerely yours,

Manuela Padilla

The records also carry a report dated July 4, 1991 stating that Madam Manuela Padilla, the Appellee's Manager, reported on June 24, 1991 that the Picasso Cafeteria was burglarized, looted and damaged during the civil commotion. The report captioned CONFIRMATION CLEARANCE, reads as follows:

Appendix F

REPUBLIC OF LIBERIA
HEADQUARTERS OF THE LIBERIA NATIONAL POLICE
MONROVIA, LIBERIA

YOUR REF.
OUR REF. PC-135/C-14CID/'91 July 4, 1991

TO WHOM THESE BRING GREETINGS
CONFIRMATION CLEARANCE

This certifies that on June 24, 1991, Madam Manuela Padilla reported to the Liberia National Police that the PICASSO CAFETERIA & RESTAURANT located on Center Street, City of Monrovia was Burglarized/Looted and damaged during the civil commotion.

Immediately thereafter, a team of detectives from the Criminal Investigation Division (CID) was dispatched to conduct an on-the-spot investigation.

Based upon evidence gathered and preserved from the crime scene, the crime of Burglary/Looting was committed by unknown person(s) who gained entry by forcibly breaking the main door.

Observations revealed that the office door was also broken, thereby gaining easy access to all of the materials including furniture and fixtures that were taken away. Vandalism was observed with signs of the discharge of firearms.

Meanwhile investigation continues.

Appendix F

SGD:
Col. Joseph F. Blamo
ASSISTANT DIRECTOR OF
POLICE AFFAIRS

APPROVED:
Col. Rudolph B. Flowers, Sr.
ACTING DIRECTOR OF POLICE

Cover note No. FP00038 for Picasso Cafeteria indicates coverage to be: fire and or lighting, explosion, earthquake, storm & tempest, aircraft, impact, riot & strikes, malicious damage, Civil commotion and flood". The other cover note, that is, No. BUR007 for Picasso Cafeteria, states this coverage: Burglary, as evidence by forcible and violent entry of premises". The face value of the first policy is $144,000.00 and the second is $30,000.00.

The thrust of the appellee's claim is that it sustained a loss of up to US $774,000.00 as a result of the civil war and therefore should be compensated in that amount. As was stated earlier, this amount is the totality of the face value of the four insurance policies of the Spanish Gallery and the Picasso Cafeteria. We have stated herein that the policies of the Spanish Gallery were cancelled and so could not respond to the appellee's claim. So it leaves the policies for the Spanish Cafeteria which total $174,000.00. The claim letter of February 4, 1992 from the appellee to the appellant and the police confirmation/clearance relate to the Spanish Cafeteria only.

The evidence fails to establish the pecuniary value of the injury suffered by the appellee to warrant which awards of the US $774,000.00 special damages and US $250,000.00 as

general damages. The rule that special damages must be particularly pleaded and affirmatively proved is not met by the evidence which the records evince. The only criterion we see in the award to the appellee is the face value of the totality of the four (4) policies, without more, two of which policies, that is, the policies for the Spanish Gallery totalling US $600,000.00 had been cancelled.

The appellee does not even state in its testimony that amount which its injury represents. What the records show is the admission into evidence of various documents including letters' invoices and receipts without stating in the records any value attached to each of them. There is no showing of what amount the appellee was claiming other than an attempt to prove the existence of the insurance policies and to claim their face value.

The appellant advances the argument that the policy did not cover war risk. The two cover notes on the Spanish Cafeteria carry coverage on the one hand for "Burglary as evidenced by forcible and violent entry of premises" and on the other hand "Fire and/or lighting, explosion, earthquake, stome & tempest, aircraft, impact, riot & strike, malicious damage, civil commotion and flood".

The Policy confirmation/clearance dated July 4, 1991 certified that on June 24, 1991 Madam Padilla reported that Picasso Cafeteria & Restaurant located on Center Street, City of Monrovia was burglarized/looted and damaged during the civil commotion. The cover notes carry the date December 1, 1989 to November 30, 1990 as the cover date. This gives us no doubt that the policy's validly existed at the time of the loss.

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Civil commotion is an uprising of citizens; an insurrection; interformance with the powers of government by violent action. *Ballentine's Dictionary, 3rd Edition, page 203.*

The same book defines civil war as an armed struggle between opposing and contending forces of the nation for the control of the government. While protection of war is not accorded to those engaging in an insurrection or rebellion against the constituted authority, unless a state of belligerency is recognized by the existing government, when hostilities attain dimensions which interfere with the exercise of the jurisdiction of the existing government in some of its territorial districts, a state of war exists. *Ballentine's L.D. 3rd. Ed. page 205.*

The appellant urges that the appellee's claims are not covered by the policies because they do not carry any war coverage. It is the position of the appellee that it took an all risk policy. None of the policies however states an all-risk coverage. The appellee says that with hostilities advancing towards Monrovia, it was within the contemplation of the parties that war coverage was envisaged. Further that assurances and warranties were given the appellee by the appellant that the appellee would be covered for war risk.

As has been stated earlier, the coverage period of the policies under discussion (the Cafeteria Policies) was December 1, 1989 to November 30, 1990. The set of facts here does not induce a conclusion that it was within the contemplation of the parties that the hostilities would spill to Monrovia because such an anticipation could not arise in any person's mind on December 1, 1989 when the policies were taken when any rumblings of the fighting did not take place until December 24, 1989.

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One of the polices does provide coverage inter alia, for civil commotion. The police report (Confirmation/clearance) one of the documents, relied upon by the appellee for its claim, states that Madam Manuela Padilla (the appellee) reported to the police on June 24, 1991 that the Picasso Cafeteria and Restaurant was burglarized/looted during the civil commotion. Cover Note FP0038 carries a cover for civil commotion, among others, and Cover Note BUR0007 carries a cover for civil commotion, among others, and Cover Note BUR0007 carries a cover for burglary as evidenced by forcible entry. We take it that in either instance the reported injury took place during the civil commotion, according to the Police report. The question then is whether what we have had in the country is a civil commotion or a civil war. We have witnessed an armed struggle between opposing and contending forces for the control of the government as opposed to an uprising by citizens or a mere insurrection. To our mind the civil conflict was an armed one between opposing and contending forces; and so we have a situation of a civil war and not a civil commotion. The loss sustained by the appellee therefore arose from the general effects of the civil war when the appellee's premises were burglarized/looted. The appellant has averred that the damage suffered by the appellee grew from the civil war and that the policies carry no war coverage. The records support this position of the appellant; which impels us to hold that the appellee's claim does not find support under the Cafeteria policies.

We have already stated that there is absent proof to sustain a damage of US $774,000.00 to warrant an award of special damages of US $774,000.00 and general damages of US $250,000.00; and that the award of such damages was to grant the appellee the payment to it of the face value of the combined

policies of the Spanish Gallery and the Picasso Cafeteria which total US $774,000.00. In the face of the cancellation of the Spanish Gallery policies as we have found earlier in this opinion and the unresponsiveness of the Picasso Cafeteria policies to coverage for war risks as we have just stated, the award of the total face value of the combined Gallery and Cafeteria policies cannot be sustained.

What we find in the records is an allegation of a damage of US $774,000.00 because the policies were said to carry an aggregate coverage of US $774,000.00. Mere allegation is not proof; and the burden of proof falls on the shoulder of the party making an allegation. The burden of proof makes it incumbent upon the plaintiff to prove by a preponderance of evidence the allegations of fact complained of in the complaint. *Knowlden vs. Reeves, 12LLR, 103, 108 (1954).*

The records in this case do not present the quality of evidence or proof to establish the proof of special damages of US $774,000.00 laid in the complaint or petition. When the facts adduced at a trial do not sufficiently preponderate in proof of a complaint to authorize the award of special damages, the judgment will be reversed. *Haid vs. Ebric, 17LLR 662, 672 (1966).* We are of the opinion therefore that the judgment of the court below not being in harmony with the evidence should be reversed.

In view of all that we have said and having consideration for the facts and circumstances of the case and the law governing, the judgment of the lower court is hereby reversed with costs against the appellee.

The Clerk of this Court is hereby ordered to send a Mandate

to the lower court directing the Judge presiding therein to give effect to this opinion. Costs against the appellee. AND IT IS HEREBY SO ORDERED.

Counsellors Cyril Jones of Jones & Jones Law Firm and Theophilus Gould of Kemp & Associates appeared for the Appellant.

Counsellors Isaac Viles of Viles and Hage Law Offices and R. F. McFarland of McFarland Legal Services appeared for the Appellee.

APPENDIX G — DECISION OF THE SUPREME COURT OF LIBERIA IN *MANO INSURANCE COMPANY V. PICASSO CAFETERIA AND SPANISH GALLERY* DATED SEPTEMBER 27, 1996

IN THE HONORABLE SUPREME COURT OF THE
REPUBLIC OF LIBERIA
MARCH TERM, A.D. 1996

PRESENT: HIS HONOUR: James G. Bull, Chief Justice
" " " Hall W. Badio, Associate Justice
" " " Karmo Soko Sackor, Associate Justice
" " " J. Laveli Supuwood, Associate Justice
" " " Fulton W. Yancy, Associate Justice

Mano Insurance Corporation, by and thru its authorized representative

RESPONDENT/APPELLANT

VERSUS

Picasso Cafeteria and Spanish Gallery, by and thru their General Manager, Madam Manuella Padilla Vargus,

PETITIONER/APPELLEE

BILL IN EQUITY FOR DISCOVERY
AND EQUITABLE RELIEF

REARGUMENT

Appendix G

HEARD: MARCH 18, 1996 DECIDED: SEPTEMBER 27, 1996

PETITION GRANTED

MR. JUSTICE SUPUWOOD DELIVERED THE OPINION OF THE COURT.

During its March Term, A.D. 1995 this Court entered a judgment reversing the decision of the Civil Law Court Sixth Judicial Circuit, Monrovia Liberia in the above captioned case. The effect of that reversal was a denial of the Petitioners' claims arising from four insurance contracts executed between the Respondent and Petitioner.

In our opinion delivered by Justice Victor D. Hne, this Court held that there were insufficient evidence adduced at the trial to support the finding of a verdict in favor of Petitioner therein, that the evidence failed to show the pecuniary value of the injury suffered, that the policies did not cover war risk and that whatever injury the Petitioner might have suffered resulted from what the Court regarded as "General Effect" of the war.

The Court went further to declare the Liberia civil crisis as a civil war which was not covered by the insurance policies. The Court also concluded that the policies covering the Spanish Gallery was cancelled. That is to say, at the time of the incident subject of the claim Petitioner's insurance contracts with Respondent had lasped.

Upon this ruling the Petitioner filed this Petition for reargument on the basis essentially that this Court overlooked points of law and facts that would have affected the outcome of this case. The Petition was approved as filed and ordered

docketed by the Date Justice Boimah K. Morris pursuant to parts 1 and 2, Rule Nine of the Rules of this Court, to wit.

"RE-ARGUMENT

1. *Permission for* — For good cause shown to the Court by petition, a re-argument of a cause may be allowed when some palpable mistake is made by inadvertently overlooking some fact, or point of law.

2. *Time of* — A petition for re-hearing shall be presented within three days after the filing of the opinion, unless in cases of special leave granted by the Court."

Upon filing of this petition as aforesaid the Clerk failed to have same docketed and the court sua sponte issued what it called Judicial Order Number 1, to wit:

August 4, 1995

Ms. Martha Bryant
Clerk of Court
Supreme Court of Liberia
Temple of Justice
Monrovia, Liberia

Re: Reargument of Cases decided by the Supreme Court during the March Term, A.D. 1995.

SUPREME COURT ORDER NO. 1 A.D. 1995

Madam Clerk:

The Court has observed that a Justice of this Court has

ordered the hearing of five petitions filed by several Counsellors for the reargument of five cases, which were decided by the Supreme Court at the end of the March Term A.D., 1995.

In view of the above, the Chief Justice and Associate Justices convened an urgent meeting on Thursday, August 3, 1995 at 1:00 P.M. to ascertain whether the hearing of the petitions filed for reargument fully comply with Rule IX of the rules of the Supreme Court. We regret that His Honour Mr. Justice Morris was not present at this meeting due to illness. After carefully discussing Rule IX of the Rules of the Supreme Court, the Court agreed that this Rule needs to be intergreted.

The Court says that whilst reargument of decided cases is permitted under Rule IX of the Rules of the Supreme Court, the order issued to the clerk by a Justice who has concurred in the Judgment of such case to re-docket the said case for reargument is not by itself sufficient to permit the reargument of the case. Further, this Court, in its interpretation of Rule IX says that a concurrent Justice may only order the filing of a petition for reargument, but it is only the court sitting en banc that must grant the reargument of the case sought to be reargued. Even so, this reargument will be granted only if the court agrees that the petition has shown good cause to warrant the granting of a reargument. Good cause is a showing in the petition that some fact or point of law has been inadvertently overlooked by the court in deciding the case which, if the court considered, would change the opinion of the Court.

In all of the five petitions filed for reargument which were approved by one of our Justices, the court has discovered that four (4) of such petitions show no good cause for this court to

grant a reargument, therefore, we shall not allow these cases to be re-docketed for consideration by this court. The cases are:

1. Ruth Perry Versus Libtraco

2. Haider Versus Haider

3. Picasso Cafeteria & Spanish Gallery Versus Mano Insurance Corporation

4. M.S. Bhati Versus C. Alexander Zoe

In view of the foregoing, the Clerk of this Court is hereby ordered to proceed to send down the mandates to the respective trial court, commanding the Judge therein presiding to give effect to the judgments handed down by this court in the above listed cases. The clerk is further order to send a copy of this order together with the mandate to each of the Trial Courts.

AND IT IS HEREBY SO ORDERED.

Given under our hands this 4th day of August, A.D. 1995.

His Honour James G. Bull
CHIEF JUSTICE, SUPREME COURT OF LIBERIA

His Honour Victor D. Hne
ASSOCIATE JUSTICE, SUPREME COURT OF LIBERIA

His Honour Frank W. Smith
ASSOCIATE JUSTICE, SUPREME COURT OF LIBERIA

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This order was issued without a hearing and without the complaint of any party. The petitioner subsequently filed an application for a special leave of this court pursuant to Part 2 of the above Rule of court essentially on the basis that Judicial Order Number 1 violated Section 21(A) of the Constitution of Liberia, to wit:

> "(a) No person shall be made subject to any law or punishment which was not in effect at the time of commission of an offense, nor shall the Legislature enact any bill of attainder or ex pose facto law."

By this argument the petitioner conceded the power of this court to promulgate rules to regulate proceedings in the courts of Liberia. That Judicial Order Number 1 should not apply to this case retroactively. In resisting this application however, Respondent maintains in counts five and eight that the petition should not be entertained because Judicial Order Number 1 as issued by this court operates as a final judgment on the issues raised therein. Hence, Res *Judi Carta* should attach.

Whether Judicial Order Number 1 as issued by this Court is a rule that should apply to this case is a preliminary question that must first be disposed of in this case. As stated supra, a party appearing in this court may petition it for a re-argument of a cause. If said petition is approved by a Justice concurring in the subject opinion, the procedure and practice in this jurisdiction is that the Clerk of Court will have the opposing party served copy of the said petition and automatically docket the case.

The court will then entertain hearing on the motion and

make a determination as to the questions raised. Nothing else is required except that the petition must be filed within three (3) days as of the issuance of the judgment.

The petitioner in this case met the requirements and there is no question raised with respect thereto. Hence, we are inclined to concede to the legal soundness of petitioners argument that their petition should have been heard.

On the point of Judicial Order Number 1 our search found no precedent in this jurisdiction and we find no basis in law to support the form and manner in which Judicial Order Number 1 was issued. This Court does not interpret statutes or rules of court in the absence of contested cases or disputes.

Moreover, Judicial Order Number 1 as promulgated was taylored to apply specifically to four cases, to wit:

1. *Ruth Perry Vs. LIBTRACO*

2. *Haider Vs. Haider*

3. *Picasso Cafeteria and Spanish Gallery Vs. Mano Insurance Corporation*

4. *M.S. Bhati Vs. C. Alexander Zoe*

It is not a rule that was made to apply generally to proceedings in the courts of this jurisdiction. To that extent we find ourselves again compelled to concede to the legal soundness of petitioners argument that same is expose facto in clear violation of Article 21(A) of the Constitution.

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As to the substantive issues raised in the motion, a recourse to the records shows that the incident in question occurred on June 24, 1990, this fact was confirmed by police report dated July 4, 1991 over the signature of Col. Rudolph Flowers Sr. then Acting Director of Police. On that day no war of any kind had entered Monrovia wherein Petitioners' insured premises were located. In fact, it was during the second half of July 1990 that the crisis entered Monrovia. Hence, it was not fair to have concluded that the subject claim resulted from the "General Effect" of a war. Assuming however, that the crisis had entered in Monrovia on or before the date in question, that fact alone would not be sufficient to warrant a denial of petitioner's claim.

As a matter of law to warrant a denial of Insurance claims, it is a settled principle at common law that the injury subject of the claim must have been a direct result of the war. See *United States vs. Standard Oil Company,* 178 F.2d 488. An actual military offensive or defensive operations the direct effect of which gave rise to the claim is required and not just from a remote effect. See *Queens Insurance Company vs. Globe and Rutgers Fire Insurance,* 282 F.2d 976.

In the instant case the Respondent mainly set forth in his pleadings a generalized allegation that the burglary which occurred at the petitioners premises resulted from what it termed civil war for which there was no coverage. No effort was made by Respondent during the trial in the court below to introduce evidence tending to prove this point. In the absence of such evidence this court finds it untenable the basis of the Respondent's argument.

The petitioner argues further that this court overlooked points of facts when it concluded that the Insurance Policies

under which she asserts her claim has expired prior to the date in question and that the policies did contain an automatic renewal clause. They offered receipts and supporting documents which showed that as late as February 18, 1990 Respondent received premium payments which cover a period beyond the date of the incident subject of the claims. The attempt here by the Petitioner on the basis of evidence found in the record is to support the argument that the said policies had not expired up to, and including the date of the incident in dispute, we are persuaded by this argument. Moreover, an automatic renewal clause requires respondent to extend the life of the policy unless cancellation was specifically requested by petitioner. That did not happen.

What is to be highlighted here is that Respondent has not denied the fact that Petitioner's premises was burglarized, except that some general effect of the civil crisis led to the burglary. That alone as we have said is insufficient in law to warrant denial of a valid claim as in this case.

Respondent further maintains in the resistance that petitioner has filed an Amended Bill of Information which information accordingly preceded the petition for re-argument. Hence, said information must be disposed of before the hearing of this petition for re-argument. Recourse to the records again reveals that the petition for re-argument was filed on August 1, 1995 while the said Amended Bill of Information was filed November 1995. Hence, that argument must crumble.

Wherefore, in view of the facts and laws controlling, the petition for re-argument is and the same is hereby granted, and the judgment of the trial court is hereby affirmed and confirmed. The Clerk of Court is hereby ordered to send a

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Mandate to the court below to a jurisdiction and enforce its judgment. Costs disallowed. AND IT HEREBY SO ORDERED.

COUNSELORS R. FLAGAA McFARLAN AND ISAAC WILES APPEARED FOR THE APPELLEE.

COUNSELLOR CYRIL JONES APPEARED FOR THE APPELLANT.

APPENDIX H — COZEN AND O'CONNOR LETTER TO JUDGE O'NEILL DATED AUGUST 8, 1995 JUDGMENT OF THE UNITED STATES

LAW OFFICES
COZEN AND O'CONNOR
A PROFESSIONAL CORPORATION
THE ATRIUM
1900 MARKET STREET
PHILADELPHIA, PA 19103
(215) 665-2000
(800) 523-2900
FACSIMILE
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STEPHEN A. COZEN
DIRECT DIAL (215) 665-2020
DIRECT DIAL FAX (215) 665-3701

August 8, 1995

Honorable Thomas N. O'Neill, Jr.
U.S. District Court for the
Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

RE: Younis Bros. v. CIGNA Worldwide
USDC, EDPA, Civil Action No. 91-CV-6784

Abi Jaoudi and Azar Trading Corporation
v. CIGNA Worldwide
USDC, EDPA, Civil Action No. 91-CV-6785
Our File Nos. 37811 and 37810

Appendix H

Dear Judge O'Neill:

We have just learned that on July 28, 1995, the Liberian Supreme Court made its first pronouncement on the civil conflict in Liberia and Monrovia in 1990, and that it recognized that, as a matter of fact and law, that conflict was a Civil War, and not a civil commotion. This opinion is of particular significance since the Supreme Court was in a unique position to observe and take judicial notice of those events as they occurred.

A faxed copy of that opinion, *Mano Insurance Corporation v. Picasso Cafeteria,* is attached for the Court's review. We intend to send Your Honor a certified copy of the opinion as soon as we receive it, but we wanted to provide this copy of the decision because of its enormous significance to the post-trial motions now pending in the above-captioned cases.

The facts of *Mano* are strikingly similar to the *AJA* and *Younis* cases. The *Mano* insured sought policy proceeds for "burglary/looting" damages it contended occurred during the fighting and turmoil in Monrovia in June, 1990, contending that the civil conflict was a "civil commotion" for insurance purposes. The insured presented the same type of police report that the plaintiffs in *AJA* and *Younis* used, signed by the same Col. Blamo. The insurer denied the claim, contending that the damages were caused by a Civil War and, thus, were excluded under the policy's War Risk Clause. The jury, however, awarded damages to the insured.

The Liberian Supreme Court *reversed* that jury award. In determining the legal status of the events occurring in Monrovia and Liberia in 1990, the Supreme Court took judicial

notice that those events constituted a civil war, *not* a civil commotion. The court further found that the insured's burglary/looting arose from and was caused by the Liberian Civil War. The passage in which the court made those findings, though lengthy, is of such significance to the *AJA* and *Younis* cases that it deserves to be reproduced in full:

> We take it that in either instance the reported injury took place during the civil commotion, according to the Police report. The question then is whether what we have had in the country is a civil commotion or a civil war. *We have witnessed an armed struggle between opposing and contending forces for the control of the government as opposed to an uprising by citizens or a mere insurrection. To our mind the civil conflict was an armed one between opposing and contending forces; and so we have a situation of a civil war and not a civil commotion. The loss sustained by the appellee therefore arose from the general effects of the civil war when the appellee's premises were burglarized/looted.* The appellant has averred that the damage suffered by the appellee grew from the civil war and that the policies carry no war coverage. The records support this position of the appellant; which impels us to hold that the appellee's claim does not find support under the Cafeteria policies.

Slip Opinion at 54.

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The court's holding that the Liberian conflict was a Civil War underscores CIGNA's arguments showing that the undisputed evidence at the *AJA* and *Younis* trial established that a Civil war had occurred. Further, the Liberian Supreme Court's reasoning is in full accord with the definitions and cases CIGNA cited in its Memorandum of Law in support of its Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial.

In particular, the Liberian Supreme Court's reasoning echoes that of the Delaware District Court in *TRT/FTC Communications, Inc. v. Insurance Co. of Pennsylvania,* (D.C. Del.) Civil Action No. 91-30-5JF, *affirmed,* October 4, 1993, No. 93-7273 (3d Cir.). As the Court will recall, the Delaware District Court found that an insurer's war risk clause excluded looting losses suffered during the conflict between Panama and the United States. In reaching its conclusion, the Delaware court stated that "regardless of whether the [robbers] were part of the Panamanian forces or a band of looters," their actions were "enabled by the military hostilities occurring between Panama and the United States," thereby placing the insured's losses squarely within the War Risk Exclusion Clause. Slip Opinion, at 6.*See* CIGNA' s Memorandum, at 48.

The Liberian Supreme Court's opinion, thus, not only supports but compels the exclusion of AJA's and Younis, losses under the War Risk Clauses in their policies.

As the Court is aware, the motions and briefs of the parties on all the post-trial issues are before the Court; the matter is now ripe for argument on those motions, or, if the Court wishes, decision without argument. I recall, of course, that the Court expressed a desire to rule on those motions before the end of the

summer, and to hear oral argument on them in that time frame. My client is vitally interested in obtaining a prompt resolution of these motions. To that end, I will make myself available at the Court's convenience for oral argument and I strongly urge a prompt ruling on these motions.

I greatly appreciate the Court's attention in this matter and look forward to hearing from Your Honor in the near future.

Respectfully,

COZEN AND O'CONNOR
s/ Stephen A. Cozen
BY: STEPHEN A. COZEN

CC: John J. Seehousen, Esquire

APPENDIX I — JUDGE O'NEILL'S AUGUST 8, 1995 FACSIMILE (INADVERTENTLY DATED DECEMBER 12, 1994)

HOG-08-1995 15:44 FROM JUDGE THOMAS O'NEILL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CHAMBERS OF
THOMAS N. O'NEILL, JR.
JUDGE
14613 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
PHILADELPHIA, PENNSYLVANIA 19106
(215) 597-2750

December 12, 1994

John J. Seehousen, Esq.
P.O. Box 795
Langhorne, PA 19047-0795

Stephen A. Cozen, Esq.
The Atrium - Third Floor
1900 Market Street
Philadelphia, PA 19103

Re: Younis Bros. & Co., Inc. v
CIGNA - C.A. No. 91-6784 and
The Abi Jaoudi and Azar Trading
Corp. v. CIGNA - C.A. No. 91-6785

Dear Counsel:

Please inform Mr. Ervin as soon as possible whether you are available next Wednesday, August 16, to present oral argument with respect to the matter raised in Mr. Cozen's letter to me of August 8, 1995.

Appendix I

The exact time of the argument on that day will have to be set when I learn whether a case listed to begin on Monday, August 14, settles or is disposed of by motion for summary judgment.

Yours sincerely,

s/ O'Neill
Judge O'Neill

APPENDIX J — LETTER AND AFFIDAVIT ANNEXED FORWARDED TO THE U.S. COURT DATED JUNE 7, 1996

June 7, 1996

Re: Younis Bros. & Co., Inc. v.
CIGNA Worldwide Insurance Company
- and -
The Abi Jaoudi and Azar Trading Corporation v.
CIGNA Worldwide Insurance Company
U.S.C.A., Third Circuit, No. 95-1905

P. Douglas Sisk, Clerk
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Mr. Sisk:

In accordance with F.R.A.P., Rule 28(j) I am enclosing herewith an original and three copies of an affidavit of H. Varney G. Sherman, Esquire, a Counsellor-at-law of the Bar of Liberia, stating that reargument will be heard in the case of *Mano Insurance Company v. Picasso Cafeteria*, decided by the Liberian Supreme Court, and cited as controlling authority by Defendant in its *Brief of Appellee*, pages 21, 24 through 26, and 29. The Plaintiffs addressed the Defendant's arguments regarding the significance of that case in the *Reply Brief of Appellants*, pages 8 through 12. I am also enclosing herewith my certification of service of same on opposing counsel.

Very truly yours,

John J. Seehousen

Appendix J

Enclosure

cc: Stephen A. Cozen, Esquire (with enclosure)
David R. Strawbridge, Esquire (without enclosure)
Douglas R. Widin, Esquire (without enclosure)
Elizabeth J. Chambers, Esquire (without enclosure)

Appendix J

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 95-1905

YOUNIS BROS. AND CO., INC.

vs.

CIGNA WORLDWIDE INSURANCE COMPANY
(D.C. Civil No. 91-cv-06784)

and

THE ABI JAOUDI AND AZAR TRADING CORPORATION

vs

CIGNA WORLDWIDE INSURANCE COMPANY; WHISTONDALE & PARTNERS, INC., aka WHISTONDALE & PARTNERS, P.L.C.; GALLAGHER PLUMER, LTD.; EAGLE STAR INSURANCE CO. LTD.; CNA REINSURANCE OF LONDON LTD.; ST. PAUL FIRE AND MARINE INSURANCE COMPANY (UK Ltd.); ORION INSURANCE CO. PLC.; NRG FENCHURCH INSURANCE CO. LTD.; U A P INS. CO.; GENERALI INS. CO.; SIRIUS (UK) INSURANCE PLC; YASUDA TRUST EUROPE LTD.; MUNICHRE GENERAL SERVICES LTD., dba GREAT LAKES RE-INSURANCE, LTD. (UK); COMMERCIAL UNION ASSURANCE COMPANY PLC; CONTINENTAL INSURANCE CO. (UK) LTD., dba CONTINENTAL ASSURANCE CO. OF LONDON, LTD.; STAR ASSURANCE SOCIETY, LTD.; ROYAL RE-INSURANCE CO. LTD.; HIR UK LTD.

(D.C. Civil No. 91-cv-06785)

Appendix J

AFFIDAVIT

OF

H. VARNEY G. SHERMAN

I am H. Varney G. Sherman, Counsellor-at-law of the Supreme Court of the Republic of Liberia; holder of Liberian passport no. OR/016186-93, issued on the 20th day of July, 1993; educated at the Louis Arthur Grimes School of Law, University of Liberia, Monrovia, Liberia and at the Harvard Law School, Cambridge, Massachusetts, U.S.A. I have been in the private practice of law in Liberia since 1980 and I am the founder and Managing Director of the law firm of Sherman & Sherman, Suites 102 & 103, Pegasus House (formerly B.P. House), Mechlin Street, Monrovia, Liberia. I am the Immediate Past President of the Liberian National Bar Association and am also currently a member of the Executive Committee of the Liberian National Bar Association.

Due to the recent civil unrest in Liberia, I am currently resident of 7009 Mathew Street, Greenbelt, Maryland 20770-3004, United States of America; telephone: (301) 614-3425; fax: (301) 614-3592.

I have been requested by Mr. John J. Seehousen, a Philadelphia attorney for whom I have heretofore provided affidavit on Liberian law in respect of the above-captioned cases, to provide an affidavit on the status of the case: *Mano Insurance Corporation v. Picasso Cafeteria and Spanish Gallery* ("*Mano*"), which was first determined by the Supreme Court of Liberia at the end of its March 1995 Term.

Appendix J

I am aware that shortly after the Supreme Court of Liberia issued its opinion and judgment in the *Mano* case at the end of its March 1995 Term, Picasso Cafeteria and Spanish Gallery filed a Petition for reargument on or about August 1, 1995; a Supplement to the Petition for Reargument was filed in January, 1996; thereafter an Amended Petition for Reargument was filed. Also in March, 1996, Picasso Cafeteria and Spanish Gallery filed for a special leave for the Supreme Court to hear its petition. I am further aware from information given to me by three (3) of the five (5) Justices of the Supreme Court of Liberia, viz., Chief Justice James Bull, Associate Justice Laveli Supuwood, and Associate Justice Karmo Sackor that the Supreme Court unanimously agreed to hear reargument of the case and would have assigned the case for reargument at the first available opportunity immediately after the Easter holiday.

While the Supreme Court was on its Easter holiday, the civil commotion in Monrovia started and the Supreme Court has not resumed business since.

I have had and continue to have special interest in the *Mano* case because I am the retained Liberian legal counsel to the Abi Jaoudi and Azar Trading Corporation, one of the plaintiffs in the above-captioned cases; I am also counsel of record for the plaintiffs in four (4) insurance claims pending in the Civil Law Court for the Sixth Judicial Circuit, Monrovia, Liberia, arising from losses which occurred during the period of the loss claimed by Picasso Cafeteria and Spanish Gallery in the *Mano* case.

All and singular the averments of fact as contained herein are true and correct; and as to those matters of information, I verily believe same to be true and correct.

Appendix J

S/ H. Varney G. Sherman
H. Varney G. Sherman

Date: 5 June, 1996

SWORN AND SUBSCRIBED BEFORE ME
THIS 5th DAY OF June, 1996

Notary Public, City of Greenbelt
State of Maryland
United States of America

JACQUELINE R. VALDEZ
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires June 14, 1997

Appendix J

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 95-1905

YOUNIS BROS. AND CO., INC.

Appellant

vs.

CIGNA WORLDWIDE INSURANCE COMPANY

Appellee

and

THE ABI JAOUDI AND AZAR TRADING CORPORATION

Appellant

vs.

CIGNA WORLDWIDE INSURANCE COMPANY, et al.

Appellee

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the affidavit of H. Varney G. Sherman, Esquire was sent by me via first class pre-paid mail to the offices of Cozen and O'Connor, THE ATRIUM, 1900 Market Street, Philadelphia, PA 19103 on Friday, June 7, 1996, to the attention of Stephen A. Cozen, Esquire, counsel for the Appellee.

Appendix J

By: _____
John J. Seehousen
Attorney for Appellants

No. 96-691

Supreme Court, U.S.
FILED
DEC 4 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

YOUNIS BROS. AND CO., INC.,

Petitioner,

vs.

CIGNA WORLDWIDE INSURANCE COMPANY,

Respondent,

-and-

THE ABI JAOUDI and AZAR TRADING CORPORATION,

Petitioner,

vs.

CIGNA WORLDWIDE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STEPHEN A. COZEN
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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Court should grant certiorari on a petition containing only unreviewable state law claims, routine hearsay evidentiary issues, and moot jury questions.

DISCLOSURE OF CORPORATE AFFILIATIONS

CIGNA Worldwide Insurance Company is a subsidiary of CIGNA Corporation, which indirectly owns 100 percent of the shares in CIGNA Worldwide Insurance Company. A Philippine corporation, P.C.I.B. CIGNA Life Insurance Company, is a nonwholly owned subsidiary of CIGNA Worldwide Insurance Company.

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Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit. The Third Circuit's opinion is reported at 91 F.3d 13 (3d Cir. 1996). The district court opinion affirmed by the Third Circuit is reported at 899 F. Supp. 1385 (E.D. Pa. 1995).

STATEMENT OF JURISDICTION

Petitioners seek to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). Jurisdiction over the petitioners' state law claims is disputed; the remaining claims are not appropriate for granting certiorari.

COUNTER STATEMENT OF THE CASE

This petition involves a suit by two Liberian businesses against their insurer, respondent CIGNA Worldwide Insurance Company ("CWW"). The petitioners filed insurance claims for looting and/or fire damage they claimed occurred at seven different locations in Harbel and Monrovia, Liberia, over a span of six months from June through November, 1990, during the height of a civil war. According to the petitioners, these losses resulted from purely local rioting, and, for that reason, were covered by their CWW policies.

CWW denied the claims. It proved at trial that petitioners' losses were caused, not by local rioting, but by an insurrection that started in December, 1989, and developed into a full scale Civil War that raged throughout 1990, and beyond. Fierce battles were fought in Harbel in June, 1990, and in Monrovia, from July through November, of 1990, the time period covering the petitioners' losses. CWW argued that the petitioners' losses were

excluded from coverage under the War Risk Exclusion Clauses contained in each of the petitioners' policies.[1]

The petitioners filed suit in the United States District Court for the Eastern District of Pennsylvania. In addition to coverage claims, petitioners contended that CWW acted in bad faith by denying their insurance claims, and that it unreasonably delayed investigating their claims. CWW answered that it was not bad faith to deny uncovered claims, and that it sent investigators to Liberia as early as war conditions would permit safe passage.

The parties disagreed initially on what law governed the case. CWW argued Liberian law applied; the petitioners argued for Pennsylvania law, including Pennsylvania's bad faith statute, 42 Pa. C.S.A. § 8371. The district court ruled that Pennsylvania law applied. Neither side contested the district court's choice of law decision on appeal.

At trial, CWW presented extensive evidence to document the inception and progress of the Liberian Civil War. The uncontroverted evidence showed that identifiable rebel groups, headed by Charles Taylor, invaded Liberia's interior border on

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1. The War Risk Exclusion Clauses in the petitioner's Fire Policies excluded losses caused "directly or indirectly" by "(c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power." The Extended Coverage Endorsements to the petitioners' Fire Policies covered looting losses caused "directly" by riot, but *excluded* looting loss "caused directly or indirectly" by "insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence." A Burglary Policy and a Money and Securities Policy CWW issued to petitioner Abi Jaoudi and Azar Trading Corporation ("AJA") excluded coverage for "loss due to war, whether or not declared, civil war, insurrection, rebellion, revolution or to any act or condition incident to any of the foregoing." Additionally, AJA's Accounts Receivable Policy excluded coverage for losses "caused by or resulting from" the same types of occurrences.

December 24, 1989, and that Taylor's group, with a later splinter group, headed by Prince Ormie Johnson, fought their way through Liberia to the country's capital city of Monrovia, on the coast. Uncontradicted evidence established that the rebel leaders' expressed goal was to overthrow the Liberian government, headed by President Samuel Doe, and to assume control of the government.[2]

Through the testimony of uncommonly reliable and disinterested witnesses, CWW documented the chaotic living conditions that attended the rebel fighting in Harbel and Monrovia, including looting, lawlessness, fires, and a complete breakdown of law enforcement and civil authority in Harbel and Monrovia. These witnesses included international journalists from the Associated Press, British Broadcasting Corporation, the London Manchester Guardian, some of whom had direct interviews and conversations with the rebel leaders, a Defense Department and Army Attache to the American Embassy, a Cabinet Minister and other officials from the Liberian government, such as the Liberian Court Administrator, the Deputy Coordinator for Operations at the Freeport of Monrovia, and officials from the tax and insurance departments. CWW also presented the testimony of residents who lived through the crisis, including a conscripted rebel soldier and Government soldiers who participated in looting.

Residents endured lack of food or water. Hordes of starving refugees fled to Monrovia from battles elsewhere in the country, and, with other starving residents, took to looting for food and other necessities of life amidst a climate where there were no police to control the turmoil, firefighters to put out fires, or even protection from Government troops, which either participated in the looting or were preoccupied with fighting the rebels. The petitioners' own employees, on cross-examination by CWW,

2. The evidence showed that, after reaching Monrovia, Prince Johnson and his followers abducted and killed President Doe.

described fighting in the streets of Harbel and Monrovia, and the severe deprivation, lawlessness and absence of civil authority caused by that fighting.

The jury, surprisingly, returned a verdict for the petitioners on the coverage and bad faith claims. Since the petitioners had demanded a jury trial, and since Pennsylvania's bad faith statute provides that, upon a finding of bad faith, "the court may" award punitive damages, interest, attorneys' fees or costs, the district court bifurcated trial of the bad faith damages. Under this bifurcation plan, the jury decided the issue of punitive damages and the district court decided whether any other bad faith damages would be awarded. The jury assessed no punitive damages against CWW, finding that CWW's conduct was not outrageous. The district court then ruled that the evidence did not support the award of interest, attorneys fees or costs.

Thereafter, the district court granted judgment notwithstanding the verdict on two grounds: (a) that the trial evidence proved CWW's War Risk Defense as a matter of law, and (b) that "no evidence" supported the bad faith verdict.[3]

While post-verdict motions were pending, the Liberian Supreme Court decided a separate case involving an insurance claim for looting damages in Monrovia in June, 1990, *Mano Insurance Company v. Picasso Cafeteria.* The Liberian high court held in *Mano* that the Civil War was the efficient, proximate cause of the looting losses, and under the provisions of the policy there at issue, that the insurance claim was not covered by the plaintiff's insurance policy.

While not challenging the district court's previous choice

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3. The district court also granted alternative relief in the form of a new trial on the grounds that: (a) the jury's verdict was against the weight of the evidence, and (b) the district court had committed reversible error by giving the ambiguity jury instruction the petitioners had requested.

of law decision, CWW suggested that the district court review the *Mano* case under comity principles, both for the Liberian high court's acknowledgement that a Civil War, and not local rioting, had occurred in Monrovia, and for the use in the Liberian decision of the same test for causation that was applicable under Pennsylvania law.

The petitioners heatedly protested this idea, calling the comity doctrine "inapplicable" and the *Mano* decision "without legal effect." Neither the district court nor the Third Circuit based their decisions on Liberian law.[4]

Using applicable United States law, the Third Circuit affirmed the district court. In particular, the Third Circuit reviewed and affirmed the district court's ruling that the Liberian Civil War was the efficient, proximate cause of the petitioners' losses. The proximate cause test used by the Third Circuit was the same test of causation approved by the Pennsylvania courts for insurance matters. *Tannenbaum v. Connecticut Fire Insurance Co.*, 127 Pa. Super. 278, 284, 193 A. 305 (1937) (approving use of proximate cause test in insurance cases).

After the Third Circuit's opinion was filed, the Liberian Supreme Court reversed its decision in *Mano*.[5] In so ruling, the Liberian high court ruled that only war risk damages caused by the direct effect of offensive or defensive military operations were excluded from coverage under War Risk Exclusion Clauses.

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4. The district court, however, stated that it would have reached the same decision had it decided the case on Liberian law. The court of appeals did not even consider the Liberian *Mano* decision.

5. The strange way in which a reconstituted, restructured court found a basis for a third review is troublesome and ought give one pause as to the validity of the opinion.

Abandoning their prior positions and arguments, and rejecting the lower courts' apparent reliance on their arguments, the petitioners now opportunistically, and overexpansively, contend that this particular decision by the Liberian Supreme Court "fixes the standard" for the test of causation in insurance cases, that "courts in [the United States] should apply that standard as well," and that the Third Circuit should be reversed for not following the second *Mano* decision, decided after the Third Circuit ruled, under principles of comity. Petition for Writ Certiorari, at 17.

REASONS FOR DENYING THE WRIT

The petition presents the Court with an array of unreviewable state law claims, routine trial evidentiary rulings, and moot Seventh Amendment questions. The petition is not deserving of review and should be denied. This Court does not grant certiorari to hear state law claims, for jurisdictional reasons. Moreover, the claims that do contain federal questions do not remotely approach the level of importance or public interest justifying certiorari, nor are they supported by any other of the "special" reasons discussed in Supreme Court Rule 10 that might warrant this Court's review.

I.

THE COURT LACKS JURISDICTION OVER THE PETITIONERS' STATE LAW CLAIMS.

This Court has repeatedly declined to review judgments resting on independent state grounds, for jurisdictional reasons. As the Court stated in *Fay v. Noia*, 372 U.S. 391, 428 (1963), it does not have the "power" to reverse decisions that are based on adequate and independent state grounds and that do not present questions of the validity or construction of the "federal

constitution, treaties, statutes, commissions or authorities in dispute." *Accord Ellis v. Dixon*, 349 U.S. 458 (1955); *Stembridge v. Georgia*, 343 U.S. 541 (1952); *McKay v. Foster*, 332 U.S. 783 (1947) (all denying certiorari because the decision below rested on nonfederal grounds). No such federal questions are raised in Sections III and VI of the petition.

Section III of the petition claims: (a) that the Third Circuit "used the wrong standard of causation," and (b) that the Third Circuit should be reversed for not according comity to the second, though not the first, *Mano* decision. The definition, scope and application of the test of causation, however, is purely a matter of state law, unless some federal right were offended by the test applied. Petitioners identify no constitutional provision or other federal right allegedly violated by the lower courts' analysis of causation, and this is fatal to their petition. The claim raised in the petition does not rise above a state law claim.

Petitioners' comity claim also raises no federal question. Since this case does not involve a suit by or against foreign governments, it does not implicate treaties with foreign countries, federal jurisdiction over foreign governments or other, similar federal issues. The question raised in the petition is simply whether the Third Circuit should have accorded comity to a judicial opinion of a foreign country. Such a claim is manifestly a state law question. *Somportex Limited v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) (a federal court in diversity applies the comity principles of the state where the federal court is sitting, in this case, Pennsylvania). The petitioners allege no constitutional or federal right otherwise implicated in the comity claim. Accordingly, review of this claim should not be granted.

Section VI of the petition also raises only a state law claim. This section of the petition alleges the substantively incorrect

claim, which is contrary to numerous state and federal cases interpreting the state statute, that the district court's interpretation of the term "may" in Pennsylvania's bad faith statute was contrary to the state legislature's intent in enacting the statute. While the heading to Section VI alleges that the lower courts' interpretation of Pennsylvania's bad faith statute was "unconstitutional," the body of the argument makes it clear that, if there is a claim of unconstitutionality being discussed, it is at most a violation of the state constitution (which this Court does not review) and not a violation of the federal constitution (which this Court might choose to review). As with the causation and comity claims, Section VI identifies no federal constitutional provision, federal statute, or other federal standard, purportedly at issue.

Accordingly, review of these claims should be denied because they raise no federal question.

II.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW TRIAL HEARSAY RULINGS RAISING NO IMPORTANT FEDERAL QUESTION.

Even where federal questions are raised in a petition, Supreme Court Rule 10 makes it clear that the Court will not grant certiorari unless there are "special and important reasons" for review. As the Court stated in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in

> such issues. Nor does it sit for the benefit of the particular litigants. "Special and important reasons" imply a reach to a problem beyond the academic or episodic.

349 U.S. at 74. In dismissing the writ, the Court wrote further:

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties . . .

349 U.S. at 79.

It is difficult to conceive of a question more lacking in broad public import, or one more limited in pertinence to "the benefit of the particular litigants," than the district court's hearsay rulings challenged in Sections I and II of the petition. The petitioners' hearsay claims refer to evidence from journalists that the rebels' goal was to overthrow the established Liberian government and assume control of the government. Such testimony was based upon direct conversations between the journalists and the rebel leaders, as well as statements from the rebel leaders the journalists heard at press conferences.

This testimony regarding the rebel leaders' intent, which clearly was not hearsay, raises nothing more than routine claims of trial error. *See, e.g.*, Fed. R. Evid. 803(3) (statements of a declarant's intent, plan, motive or design are not excluded by the hearsay rule). There is nothing "special" or "important" about these claims, nor does the petition itself argue that any broader import is involved.

Moreover, the petition misrepresents the record in claiming

that the district court "weighed" the evidence the petitioners erroneously characterize as hearsay. In upholding the War Risk Defense as a matter of law, the district court did not consider the weight of the testimony the petitioners claim is hearsay, as the petition contends. Rather, the district court rested its decision on the fact that the testimony was *uncontradicted*, which the district court was required to consider. *Brady v. Southern Railroad Co.*, 320 U.S. 476, 479-80 (1943) (when, without weighing credibility, there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict . . . or by judgment notwithstanding the verdict); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting *Brady*, and stating that "the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict"). The hearsay claims are thus not deserving of the Court's review.

III.

CERTIORARI SHOULD NOT BE GRANTED TO RENDER WHAT WOULD AMOUNT TO ADVISORY OPINIONS ON CLAIMS THAT ARE MOOT.

The Court does not review questions that are moot and would result only in the issuance of advisory opinions. *Montana v. Imlay*, 506 U.S. ___, 113 S. Ct. 444, 121 L. Ed. 2d 310 (1992) (certiorari petition dismissed as improvidently granted because "no matter which party might prevail in this Court," the judgment would be the same); *United States v. Richardson*, 418 U.S. 166, 171 (1974) (the Court's power may not be exercised over questions that are "moot or calling for an advisory opinion"); *Fay v. Noia*, 372 U.S. 391, 430 (1963) (the Court is obliged to "refrain from rendering advisory opinions or passing upon moot questions").

Sections IV and V raise issues connected with the bifurcated trial of the bad faith damages. Unquestionably, however, the dispositive ruling concerning the petitioners' bad faith claims was the district court's "no evidence" finding. By that ruling, the district court determined, and the Third Circuit agreed, that the petitioners had not made out the elements of their bad faith claims as a matter of law. The petitioners of course may not challenge that ruling here. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("a court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"), citing *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

Nevertheless, Sections IV and V of the petition allege that the district court's bifurcated trial of bad faith damages violated Seventh Amendment jury guarantees. Such a claim is irrelevant, given the present posture of the case. Since the petitioners did not prove their bad faith claims at all, and are not entitled to recover any damages, they would not be entitled to recover such damages no matter how the Court ruled on the petition's purported Seventh Amendment claim. The petition's challenge to the way the bad faith *damages* were tried is, clearly, moot. Thus, even if a potential Seventh Amendment issue were lurking somewhere in these sections, which respondent cannot find, since a decision on such a question would not have the slightest impact on the judgment in this case, any decision by this Court would be advisory, and, therefore, impermissible. *Fay v. Noia*, 372 U.S. at 430, n. 40 ("if the same judgment" would be rendered after the lower court's ruling were "corrected," the Supreme Court's opinion "could amount to nothing more than an advisory opinion"). Certiorari, thus, should not be granted for these claims.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

STEPHEN A. COZEN
Counsel of Record
DAVID R. STRAWBRIDGE
DOUGLAS R. WIDIN
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No. 96-691

Supreme Court, U.S.
FILED
DEC 17 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

YOUNIS BROS. & CO., INC.,

Petitioner,

vs.

CIGNA WORLDWIDE INSURANCE COMPANY,

Respondent,

-and-

THE ABI JAOUDI AND AZAR TRADING CORPORATION,

Petitioner,

vs.

CIGNA WORLDWIDE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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Lutz Appellate Services, inc.

14 pp

Respondent claims that the Petition only asserts "unreviewable state law claims, routine hearsay evidentiary issues and moot jury questions.[1] That characterization ignores the Petitioners' claim that the trial court's actions curtailed Petitioners' right to a jury trial, a right guaranteed under the Seventh Amendment, *Beacon Theatres v. Westover,* 359 U.S. 500, 3 L. Ed. 988 (Question 4 and 5); and, was an abuse of the lower court's discretionary powers, *Supervisors, Rock Island Co. v. United States,* 71 U.S. 534, 18 L. Ed. 419 (Question 6).

CIGNA contends that the Court cannot reach these issues because they are moot. It argues, they are moot because the "the petitioners did not prove their bad faith claims at all," page 11. That statement is incorrect. Petitioners proved bad faith, which Respondent conceded on page 4: "The jury, surprisingly, returned a verdict for the petitioners on the coverage and bad faith claims." Even the perfunctory opinion of the Third Circuit did not hold those issues moot, or unnecessary to address.[2]

The subsequent action of the lower court, in substituting its view of the evidence for the Jury's findings, should not deprive the Petitioners from seeking a review of the lower court's improper curtailment of their right to a jury trial. To hold otherwise, would mean that review of constitutional issue of improperly infringing on a jury's function can be avoided by usurping it.

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1. Respondent's Brief in Opposition, Counter Statement of the Question Presented, page i.

2. It found that the pronouncement of a new requirement to prove bad faith (outrageousness); the holding that there is no right to damages if an insurer act in bad faith in the investigation and adjustment of a claim; the curtailment of the Petitioners right to a jury trial; the interpretation of judicial discretion as allowing a reconsideration of facts decided by a jury; and, the interpretation of a statute in a manner the Pennsylvania Supreme Court has ruled would be unconstitutional, required no comment, other than "the other allegations of error . . . have no merit . . ." footnote 1.

It is respectfully submitted, assuming, *arguendo*, that the granting of the judgment n.o.v. could render those question moot that fact would be a basis for this Court to decide whether the judgment was proper. Petitioners should not be denied a review of the Seventh Amendment issue by the entry of judgment n.o.v., if granting that judgment was erroneous.

CIGNA argues that the Petition lacks broad public import and is of limited pertinence. These cases meets those criteria. At a time when the jury system is under criticism, it is essential that this Court again emphasize the importance of maintenance of the jury as the fact-finding body, *Beacon Theatres, supra,* U.S. at 501.

In these action that function has been attacked in three separate ways: The trial court limited the issues it would allow the jury to decided (Appendix D, page 63a); it conducted an "independent review of the evidence" (Appendix A, page 45a) and held that despite the jury's finding of bad faith it would not award the damages allowed by statute; and, it reversed the jury's determination of disputed questions of fact and the inference that could be drawn from proven facts (Appendix B, page 22a).

The jury found, as Petitioners have always maintained, that the Respondent failed to prove that the "war risk exclusion" was applicable. While CIGNA established that there was fighting and chaos in Liberia, it failed to prove that there was an intent to seize control of the government and exercise its powers.

The lower court clearly indicated that the evidence it relied on in deciding that issue, was the hearsay testimony of Mark C. Huband (Appendix B, page 21a).[3] That testimony, characterized

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3. The Third Circuit did not state what evidence it viewed as establishing that Taylor and/or Johnson "intended to overthrow the government and seize power (Appendix A, page 4a)." However, all the evidence on that issue was summarized in the Petition, pages 5 and 6. That summary was not disputed by Respondent.

by CIGNA as "uncommonly reliable" was, through cross examination, proven unreliable and/or untruthful (Petition, page 6). And, absent that testimony there is no basis to sustain the lower court's action.

The chaos that existed in Liberia does not equate to "war" within the meaning of CIGNA's policies exclusions. Yet, both the lower court[4] and the Third Circuit[5] viewed the level of chaos as "proving" there was an insurrection. While those courts believe that the events allow but one conclusion, the Court in Liberia has reached a different conclusion.

On December 2, 1996 the trial court in Liberia issued rulings in four cases pending before it. Respondent herein is also the Respondent in those actions. In those cases, after considered Respondent's arguments, the court, citing American law, denied Respondent's motions, holding:

> In proving that the losses fall under the war risk exclusionary clause, the Defendant is required to prove that the only reasonable inference from the hostilities in Liberia at the time of each of the losses occurred, is that one or more of the parties to said hostilities intended to seize control of the Government of Liberia and exercise its powers.

Bridgeway Corp. v. CIGNA Worldwide Ins. Co., Alliance Motor Corporation v. CIGNA Worldwide Ins. Co., and, *H & A Enterprises v. CIGNA Worldwide Ins. Co.* Appendix K.[6]

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4. "The issue before this Court is whether as a matter of law that turbulence rose to the level of insurrection . . ." Appendix B, page 20a.

5. ". . . numerous witnesses testified to the objective manifestations of the intent . . . " Appendix A, page 4a.

6. Because the fourth case, *Fouani Bros. Corp v. CIGNA Worldwide Ins. Co.*, also dealt with other issues a separate opinion was issued, which incorporated, verbatim, the holding of *Bridgeway, supra.*

The court held: "It is the Jury, which . . . must hear the evidence and decide whether the hostilities constitute war . . ."

The court cited the second *Mano* opinion in holding that "[t]he court cannot take judicial notice that the hostilities constituted war." Hence the Court has now clearly indicated that the interpretation CIGNA ascribed to the original *Mano* decision "the [Liberian] Supreme Court took judicial notice that those events constituted a civil war, *not* a civil commotion," Appendix H, 100a-101a, was incorrect.

The subsequent rulings by the Liberian courts indicate that lower court was incorrect when it stated it would "reach the same result applying Liberian law" Appendix B, page 25a. As set forth in the Petition, page 9, the *Mano* decision was the catalyst for the lower court's action sixteen months after the jury made its findings. That mistaken belief and, Petitioners assume, a desire for uniformity of decision, to avoid forum shopping and the unequitable administration of the law, undoubtedly influenced the lower court's reasoning.

Respondent's brief, page 5, in addressing what effect should be given to the holding of the Liberian Supreme Court's final decision in the *Mano* case, misstates Petitioners' argument in the lower court;[7] and, questions "the validity of the opinion."[8]

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7. Petitioners did not argue that the doctrine was "inapplicable" or "without legal effect." Petitioners position was that there was "no basis for that decision being given conclusive effect;" and, that "the issues confronted by the Liberian Court were different than the one decided by this Court. In *Mano* there was no issue of whether the Plaintiff's losses occurred as a result of the civil war."

8. Unlike America, in Liberia the Justices of the Supreme Court are appointed for a term of years, not life. Respondent does not suggest that the "reconstituted, restructured court" was not properly and duly appointed; or, provide any basis for asserting that this Court should question the validity of the final decision of the Liberian Supreme Court.

The second *Mano* opinion (Appendix G) states the standard of causation that must be used in Liberia. The original *Mano* opinion (Appendix F) was ambiguous as to what the court was holding. It was Petitioners' contention that the Liberian Supreme Court was not deciding if a civil war occurred; nor if the losses were caused by a civil war;[9] and, therefore was not applicable to the issues before the lower court. The second *Mano* opinion (Appendix G) has no ambiguity and is clearly applicable to the issues present in these cases.

CONCLUSION

For all of the reasons both set forth above and in their Petition, Younis Bros. & Co., Inc. and The Abi Jaoudi and Azar Trading Corporation respectfully request that this Honorable Court issue an order granting a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Attorney for Petitioners
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9. The issue the Liberian Supreme Court stated it was considering was "[w]hether the performance under the contract was excused by the civil war (Appendix F, page 77a)."

APPENDIX K — COURT'S RULING

TEN DAY'S CHAMBERS SESSION
MONDAY, DECEMBER 2, 1996
SEPTEMBER TERM, A.D. 1996

SIXTH JUDICIAL CIRCUIT COURT,
MONTCERRADO COUNTY
SITTING IN THE SEPTEMBER TERM, A.D. 1996

In Re: (1) BRIDGEWAY CORPORATION, PLAINTIFF VERSUS CIGNA WORLDWIDE INSURANCE COMPANY, DEFENDANTS, (2) ALLIANCE MOTOR CORPORATION, PLAINTIFF VERSUS CIGNA WORLDWIDE INSURANCE COMPANY, DEFENDANT, AND (3) H & A ENTERPRISES VERSUS CIGNA WORLDWIDE INSURANCE COMPANY, DEFENDANT, ACTION OF DAMAGES FOR BREACH OF CONTRACT.

Court's Ruling on Disposition of Law Issues

Pleadings having rested, the four (4) Motions to Dismiss consolidated, disposed of and assigned for the Disposition of Law Issues, the Cases (1) Bridgeway Corporation versus Cigna Worldwide Insurance Company, (2) Alliance Motor Corporation versus Cigna Worldwide Insurance Company, and (3) H & A Enterprises versus Cigna Worldwide Insurance Company was also Consolidated, when called for the disposition of Law issues because they contain Common issues.

The first issue of law is on the timely filing of claim. Generally, Insurance law provides that there is one school of thought which holds that untimely filing of claim is ground to disclaim liability, while there is another school of thought which holds that the delay in filing claim merely postpones the time

of settlement. 45 Am Jur 2nd, *Insurance*, section 1331. In fact it is also law that requesting additional proof of law, as the Defendant did in each of these cases, is waiver of objection that proof of loss was not timely furnished. 43 Am Jur 2nd, *Insurance*, Section 1331. However, as stated in the Ruling on the Motion to Dismiss, the Defendant, a foreign Insurance Company who conducted business in Liberia through an Agent, did not have an Agent in Liberia at the various dates of the losses up to date of filing of these actions, in violation of the Insurance Law of Liberia, Section 4, *Insurance,* Law of Liberia. Of course, the absence of a Defendant from Liberia tolls the statute for commencement of an action until said Defendants returns to Liberia. Section 2.70(1), Civil Procedures Law.

In the light of these Liberian Laws and the Defendant's conduct, it is the Jury which, as trial of the facts, must decide whether the Defendant can, in good faith, benefit from its defense of untimely filing of claims against it.

The second legal issue relates to the war risk exclusion clause; and there is no disagreement between the parties as to the laws which govern. That is, the burden of proof is upon the Defendant, as the insurer, to prove that the losses fall under the exclusionary clause, as Liberian law provides that he who alleged the existence of a fact should prove it beyond reasonable doubt. Section 25.5(1), Civil Procedure Law, 1 LCLR page 198. General principles of Insurance Law provides that an insurer seeking to defeat a claim because of an exception or limitation in the policy has the burden of proving that the loss, or part of thereof, comes within the purview of the exception or limitation set up. 44 Am Jur 2nd, *Insurance*, section 1330.

On the other hand, the burden of proof is the Plaintiffs to

each prove the quantum of loss sustained. The insurance being for indemnification of the insured when the loss occurs, it is the insured who must prove the quantum of loss. The liability of the insurer is limited to the obligation to pay the actual loss sustained, which will indemnify the insured, not to exceed the amount of the policy. 44 Am Jur, *Insurance,* Section 1500. So it is not enough for the insured to merely show the amount of insurance coverage, the insurer must also show and prove that the loss falls within the provision of the insurance policy. 43 Am Jur 2nd, *Insurance,* section 1101.

In praying that the losses fall under the war exclusionary clause, the Defendant is required to prove that the only reasonable inference from the hostilities in Liberia at the time each of the losses occurred, is that one or more of the parties to said hostilities intended to seize control of the Government of Liberia and exercise its powers. The Defendant must also prove that such hostilities were the direct cause for each of the losses. *Holiday Inns Inc. v. AETNA Insurance Company,* 571 F. Supp. 1460 (1983); *Pan American World Airlines Inc. v. AETNA Casualty and Surety Company,* 505 F.2d 989 (1974), *Home Insurance Company of New York v. Davilla,* 212 F.2d 731 (1954)

The court cannot take Judicial notice that the hostilities contribute war; it is required by Liberian law that the insurer must prove by evidence that the hostilities constitute war, as that term is used in insurance, law. *Picasso Cafeteria and Spanish Gallery v. Mano Insurance Company,* March 1995, Supreme Court Opinion. It is the Jury which in the light of the standard set by insurance law, must hear evidence and decide whether the hostilities constitute war, as the term is defined by insurance law.

Appendix K

Both Plaintiffs and Defendant have claimed that admissions have been made by each side to the advantage of the other, whether said admission of fact was direct or implied by way of failure to deny an averment of fact. Liberian law is that where the responsive pleader fails to specifically or generally deny a plea of fact, that would be deemed admitted. Section 9.8(2) & (3) civil procedure law, 1 LCLR pages 109-110. In these pleadings, we observe that where the Answer did not specifically deny, it was to generally deny. So the contention of the Plaintiffs on this issue is untenable.

As to the contention of the Defendant that the use of the term "Civil Commotion" or "Civil Crisis" in the Plaintiffs' pleadings is admission that the hostilities which occur in Liberia constitute war, the law is clear that "Civil Commotion" is prolonged civil disturbance, which does not attain the statute of war. Black's Law Dictionary, sixth edition, page 279. So the Defendant's submission on this issue of admission is untenable.

Some of the pleadings raise the issue of the currency of indemnity, that is, whether or not the indemnity should be paid in United States Dollars or Liberian Dollars. The Plaintiffs have submitted in their legal memoranda that Defendant is obligated to pay United States dollars as indemnity, where it can be inferred from expressed language of the agreement or the conduct of the parties that there is an agreement for the indemnity to be paid in United States Dollars. And the Plaintiffs have cited the *United States Trading Company v. Wray* case, October 1993, Term Supreme Court Opinions and March 1994 Term Supreme Court Opinions and the *Bridgeway Corporation v Citibank Case* March 1993 Supreme Court opinions as their reliances. The Defendant did not address the issue in its legal memoranda and counsel for both parties did not argue that issue. So the court

accepts the holding in the two (2) Supreme Court cases cited by the Plaintiffs to govern the issue as to whether or not the indemnity should be paid in the United States dollars or Liberian dollars.

The issue of general damages arising out of an insurance contract was also raised by the pleadings and squarely addressed by the legal memoranda filed by the Plaintiffs. And Plaintiffs relied on the case *Insurance Company of North America v. M.S. Batthi & Sons*, March 1980 Supreme Court Opinions to support its position that general damages may be awarded by the jury in an action of damages for breach of an Insurance contract. This issue was never addressed by the legal memoranda submitted by the Defendant, neither was it argued by the Defendant. So this Court accepts the ruling in the Case *Insurance Comany of North America v. M.S. Batthi & Sons.* March 1980 Supreme Court Opinions, which provides for general damages. And although there is authority to the contrary, it has been held that the intentional bad faith refusal of an insurer to make payments due under an insurance policy constitutes a tortious interference with the protected property interest of the insured, for which damages may be recovered to compensate for all detriment proximately resulting therefrom, including economic loss as well as emotional distress resulting from the conduct or from the economic losses caused thereby. Further, although there is authority to the contrary, it has been held that, under the proper circumstances, punitive or exemplary damages may be recovered from an insurer guilty of wrongful delaying or refusing to make payments due under an insurance contract, in addition to the awarding of consequential damages, 44 Am Jur 2d, Insurance, section 1771. So in the light of the general damages awarded in the *Insurance Company of North America v. M.S. Batthi & Sons* case it should be left with the jury to decide whether the Defendant's conduct was such to warrant the award of general damages.

Appendix K

In view of the foregoing and considering that the legal issues are inter-twined with the facts in each court of the pleadings, no particular count can be dismissed at this stage, based on simply law issues.

Accordingly, the Complaints, Answers and Replies are ruled to trial by a Jury based on the principals of law as stated in this ruling. AND SO ORDERED.

GIVEN UNDER MY HAND AND
SEAL OF THIS COURT THIS
2ND DAY OF DECEMBER A.D. 1996

s/ William B. Metzger, Sr.
William B. Metzger, Sr.
ASSIGNED CIRCUIT JUDGE PRESIDING,
SIXTH JUDICIAL CIRCUIT,
MONT. COUNTY, R.L.

7TH DAY'S CHAMBERS SESSION
MONDAY, DECEMBER 2, 1996
SEPTEMBER TERM A.D. 1996

THE COURT, Mr. Sheriff, call the cases *BRIDGEWAY CORPORATION V. CIGNA WORLDWIDE INSURANCE COMPANY; ALLIANCE MOTOR VS. CIGNA WORLDWIDE INSURANCE COMPANY AND H&A ENTERPRISES VS. CIGNA WORLDWIDE INSURANCE COMPANY;* ACTION OF DAMAGES FOR BREACH OF CONTRACT FOR RULING OF LAW ISSUES. AND SO ORDERED.

THE SHERIFF: Your Honor cases called and the parties present in court. And submits.

Appendix K

REPRESENTATION: The Plaintiffs are represented by the Sherman and Sherman Inc. and present in Court is CLLR. Yarfie F. Williams and CLLR. H. Varney G. Sherman. And submits.

The Defendant is represented by David A.B. Jallah Law Firm and present in Court CLLR Sie-A-Nyenah Yuch and CLLR David A.B. Jallah. And submits.

THE COURT: Representations are noted. And so ordered.

THE COURT: See ruling attached. And so ordered.

To which ruling of your Honour Counsels for Defendant except. And submits.

THE COURT: Exceptions noted. And so ordered. MATTER SUSPENDED.